

Bankruptcy Law and the Maturing of American Capitalism

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I. INTRODUCTION AND OVERVIEW

If the Bankruptcy Clause slipped without significant debate into our Constitution,¹ its legislative application proved endlessly controversial for a century thereafter. Before finally implementing a permanent regimen of bankruptcy relief in 1898,² Congress generated three abortive systems³ from a debate as heated and philosophically far-reaching as those addressing monetary policy, the tariff, or the two Banks of the United States, in the process tracing with unequaled precision the nation's basic political faultlines.⁴ Bankruptcy proved so divisive because it was perceived by Americans as emblematic of a fundamental issue of economic identity: the expansion and consolidation of the capitalist presence in American life.

If de Tocqueville's "new model man," the American, was always a child of the commercial revolution,⁵ a national consensus favoring untrammelled economic freedom concealed a deep conflict of expectation as to what manner of polity would result. One tradition of thought, consistent in its basic elements

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¹ Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215 (1957).

² Act of July 1, 1898, ch. 541, 30 Stat. 544 (1898). The Act was subsequently amended on a number of occasions and eventually supplanted by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). It was permanent, however, in the sense that it established the outlines of the system that remains with us today.

³ The Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (1867); The Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (1841); The Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (1800).

⁴ DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 179 (1980); F.R. Noel, *A History of the Bankruptcy Clause of the United States Constitution*, 181 (1920) (unpublished Ph.D. dissertation, Catholic University of America).

⁵ On the commercial dynamic of the new republic, see JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s* (1984), and GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* 84-87 (J. Sibree, trans., 1956).

over many decades, proposed an American society *intensive* in its development, rapidly progressing toward commercial and industrial maturity. This view emphasized the role of accumulative activity as "the life and spring of the health of a nation,"⁶ to which our national prosperity was "principally owing." It presented market capitalism, with its restless, expansive energy,⁷ as the driving wheel of our collective "progress," a term encompassing material prosperity, technical development, education, and expanded cultural activities: in short "the spirit of improvement . . . abroad upon the earth."⁸ Those of this persuasion, many drawn from the mercantile and professional classes, were willing to permit (and indeed to encourage through government action) the increased aggregation of private capital as an instrument of national development.⁹ This ideology found its first and perhaps purest political expression in Hamiltonian federalism. Later, the Whig Party of Henry Clay and the postbellum Republican Party of McKinley adopted its basic tenets.

An alternative tradition of thought, commonly designated "republican" and identified primarily with the agricultural sector, advocated *extensive* development: a socially and economically stable nation of small producers opening ever-new territories to cultivation.¹⁰ To republicans, the yeoman

⁶ Tennessee campaign newspaper quoted in JOHN ASHWORTH, 'AGRARIANS' AND 'ARISTOCRATS': PARTY POLITICAL IDEOLOGY IN THE UNITED STATES, 1837-1846, at 73 (1983); 38 ANNALS OF CONG. 1097-98 (1822) (remarks of Rep. Wood); *see also*, 38 ANNALS OF CONG. 1230 (1822) (remarks of Rep. Cushman); LAWRENCE F. KOHL, THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA 119 (1989); LEO MARX, THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA 168 (1964); Hon. Daniel Barnard, *Commerce as Connected with the Progress of Civilization*, 1 HUNT'S MERCHANTS' MAG. 3 (1839).

⁷ Andrew Carnegie, *Wealth*, 148 N. AM. REV. 653, 656 (1889).

⁸ John Quincy Adams, *First Annual Message*, in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 865, 882 (James D. Richardson ed., New York, Bureau of National Literature 1897).

⁹ *See* ASHWORTH, *supra* note 6, at 1; HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 76 (1990); Norman K. Risjord, *The Virginia Federalists*, 33 J.S. HIST. 486 (1967).

¹⁰ Republicanism as the rhetoric of opposition to capitalism had its wellsprings in the Country-party thought of late seventeenth century England. J.G.A. Pocock, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975). It was transplanted to America during the eighteenth century to become profoundly influential in the cause of independence. *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1972). For a variety of viewpoints on the influence of republicanism through the early national period, *see* Joyce Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q., 3d Ser., 20 (1986); Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in*

farmer, immune to the vice-inducing luxury and free of the economic dependency that together characterize the minions of commerce, pursues a vocation that develops his mind, his morals, and indeed, his full humanity. He thus stands uniquely positioned to promote the "virtue" of the polity.¹¹ Merchants and finance capitalists, by contrast, were seen by republicans as parasites who drop their buckets into wells dug by others. As mere paper wealth, their profits represent no increase in real economic product that might benefit society at large.¹² Unbounded by any connection to honest labor, their profits could accrue to such a level as to enable the capitalist sector to upset the delicate counterpoise of interests that sustain a free and virtuous social order, and substitute a morally vacuous dynamic of market transactions and profit calculations that respects the social identity of neither person nor property.¹³

the New American Republic, 43 WM. & MARY Q., 3d Ser., 3 (1986); Colin Gordon, *Crafting a Usable Past: Consensus, Ideology and Historians of the American Revolution*, 46 WM. & MARY Q., 3d Ser., 671 (1989); Issac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q., 3d Ser., 3 (1988); Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q., 3d Ser., 334 (1982); Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q., 3d Ser., 49 (1972).

¹¹ This was a fundamental element of republican thought of all eras. See, e.g., ARISTOTLE, *THE POLITICS* bk. 7, ch. 9; H.T. DICKINSON, *LIBERTY AND PROPERTY: POLITICAL IDEOLOGY IN EIGHTEENTH-CENTURY BRITAIN* 150 (1977); Thomas Jefferson, "Query XIX," *Manufactures*, in *NOTES ON THE STATE OF VIRGINIA* 165 (William Peden ed., 1955); RUSSELL KIRK, *RANDOLPH OF ROANOKE: A STUDY IN CONSERVATIVE THOUGHT* ch. 5 (1951); MICHAEL LANZA, *AGRARIANISM AND RECONSTRUCTION POLITICS: THE SOUTHERN HOMESTEAD ACT* ch. 1 (1990); Oration at Worcester, July 4, 1837, in *MEMOIRS, SPEECHES AND WRITINGS OF ROBERT RANTOUL, JR* 561-62, (Luther Hamilton ed., Boston, John P. Jewitt & Co. 1854).

¹² "Any economic system," wrote radical republican John Taylor, "that transfers property from productive and natural (agricultural) to unproductive and artificial (paper) industry is tyrannical." JOHN TAYLOR, *TYRANNY UNMASKED* 51 (Washington City, Davis & Force 1822). "A mere exchange of money," he believed, "creates nothing, and does not augment the national prosperity." John Taylor, *The Necessities, Competency and Profit of Agriculture*, 2 *FARMER* 193, 194 (1820). Trade, to republican sentiments, was hardly more productive than speculation. As Benjamin Franklin wrote, its profits were "generally Cheating," compared to the true wealth produced by agriculture, "the only honest Way; wherein Man receives a real Increase of the Seed thrown into the Ground, in a kind of continual Miracle wrought by the Hand of God . . . as a reward for his innocent Life and virtuous Industry." Benjamin Franklin, *Positions to Be Examined*, Apr. 4, 1769, in 16 *FRANKLIN PAPERS* 107, 109 (Williams Wilcox ed., 1972).

¹³ ROBERT E. SHALHOPE, *JOHN TAYLOR OF CAROLINE: PASTORAL REPUBLICAN* 128 (1980). As Emerson warned, the unrestrained commercial impulse would lead directly to the "invasion of Nature by Trade with its Money, its Credit, its Steam, its Railroads . . . to

To varying degrees, the political parties of Jefferson, Jackson, and William Jennings Bryan each espoused this system of belief.

It is easily seen why this conflict should have been articulated with unsurpassed force in deliberations over the rules affecting commercial credit, of which bankruptcy forms a prominent part. The instrumentalities of credit¹⁴ are all-important to a capitalist economy.¹⁵ Indeed, Schumpeter and others have posited "systematized credit" as the characteristic of capitalism that distinguishes it from other economic orders.¹⁶ Credit is the universal solvent of the market economy, greatly increasing the liquidity of assets.¹⁷ By detaching the reinvestment of (anticipated) profits from the marketing of commodities produced by earlier investment, credit speeds the cycle of capital accumulation.¹⁸ Acting as the nervous system of the economy, credit permits the pooling of capital assets from diverse sources and their rapid deployment in

upset the balance of man, and establish a new, universal Monarchy more tyrannical than Babylon or Rome." RALPH WALDO EMERSON, 5 JOURNALS OF RALPH WALDO EMERSON 285 (Edward Waldo Emerson & Waldo Emerson Forbes eds., 1911); *see also* 38 ANNALS OF CONG. 955 (1822) (remarks of Rep. Mallary); WILLIAM LEGGETT, DEMOCRATICK EDITORIALS: ESSAYS IN JACKSONIAN POLITICAL ECONOMY BY WILLIAM LEGGETT, PART TWO (Lawrence H. White ed., 1984); JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 56-57 (Fredericksburg, Green & Cady 1814).

¹⁴ Credit denotes "any exchange of goods initially possessed for the promise of a future transfer of disposal over utiles, no matter what they may be." MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 180 (A.M. Henderson & Talcott Parsons trans., 1947). The time lapse between promise and performance characterizes the rights of creditors as "property in exchange," by contrast to "property in possession."

¹⁵ FORREST & ELLEN SHAPIRO McDONALD, REQUIEM: VARIATIONS ON EIGHTEENTH-CENTURY THEMES 185 (1988); ADAM SMITH, WEALTH OF NATIONS 275-77 (1937).

¹⁶ KARL MARX, 2 CAPITAL 116 (Frederick Engels ed., 1967); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 167 (3d ed. 1950); THORSTEIN VEBLEN, THE THEORY OF BUSINESS ENTERPRISE 133 (1935). For an excellent analysis of the function of credit in a capitalist society, *see* DAVID HARVEY, THE LIMITS TO CAPITAL ch. 9 (1982).

¹⁷ "Property of all kinds loses a portion of its value when it is deprived of its convertible character," stated New York's Senator Tallmadge in 1840; "[c]redit alone, in this country, renders property saleable." CONG. GLOBE app., 26th Cong., 1st. Sess. 798 (1840).

¹⁸ "[Credit] is a kind of mercantile funding system, which enables [merchants] to enlarge their capital by anticipating the profits of their enterprises." 38 ANNALS OF CONG. 1098 (1822) (remarks of Rep. Wood); *see* KOHL, *supra* note 6, at 195 ("By the use of the principle of credit [commerce] has anticipated means, and produced incalculable wealth out of resources which otherwise might have lain dormant." (emphasis omitted) (quoting Calvin Colton)); VEBLEN, *supra* note 16, at 94-95.

response to supply and demand signals,¹⁹ eliminating geographical barriers to investment.²⁰ Thus credit, as much as any other factor, is responsible for the ability of capitalism, in Marx's famous phrase, to "annihilate . . . space with time."²¹

While those Americans sympathetic to capitalist development routinely supported measures to promote the extension and rationalization of the credit network,²² those in the republican tradition perceived in credit a mysterious rule guided by whim and illusion, "the evil Spirit of general Vogue,"²³ and the fortunes of speculation. Credit, in their view, embodied the fickle, unpredictable currents of change destructive to a virtuous republic.²⁴ Thus, credit stood paramount among the forms of transient or imaginary property that threatened to usurp the position of the "real" property (in both senses) of the agriculturalist.²⁵

With the increase in credit utilization that accompanies commercial development, the incidents and consequences of default expand as well.²⁶

¹⁹ ROBERT HEILBRONER, *THE NATURE AND LOGIC OF CAPITALISM* ch. 3 (1985).

²⁰ "Credit has built cities, cleared wilderness, and bound the remotest parts of the continent together with chains of iron and gold." Edward Everett, *Accumulation, Property, Capital, and Credit*, 1 HUNT'S MERCHANTS' MAG. 21, 27 (1839).

²¹ KARL MARX, *GRUNDRISSE* 539 (1973); see also DAVID HARVEY, *THE URBANIZATION OF CAPITAL: STUDIES IN THE HISTORY AND THEORY OF CAPITALIST URBANIZATION* 38 (1985). This formulation occurred to others besides Marx. Nineteenth-century novelist Charles Brockden Brown, for example, described commerce as possessing a "wonderful power of annihilating, in its usual and natural effects, space." STEVEN WATTS, *THE REPUBLIC REBORN: WAR AND THE MAKING OF LIBERAL AMERICA, 1790-1820*, at 186 (1987); see also JOHN C. CALHOUN, 1 *THE WORKS OF JOHN C. CALHOUN* 398-406 (Richard K. Cralle ed., New York, Appleton & Co. 1854); Ralph Waldo Emerson, *The Young American*, in 1 *WORKS OF EMERSON* 365 (1968).

²² DANIEL W. HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 17 (1979); WATSON, *supra* note 9, at 209. Addressing "the cause which makes us, above all others, a happy, great, and prosperous people," a New Senator Tallmadge once asserted, "Sir, it is contained in two words: it is our CREDIT SYSTEM." 12 CONG. DEB. 1828-29 (1836).

²³ POCOCK, *supra* note 10, at 454 (quoting Daniel Defoe).

²⁴ See, e.g., CONG. GLOBE app., 26th Cong., 1st Sess. 483 (1840) (remarks of Rep. Hubbard); *id.* at 245 (1840) (remarks of Sen. Buchanan); WILLIAM M. GOUGE, *A SHORT HISTORY OF PAPER-MONEY AND BANKING IN THE UNITED STATES* 136 (Philadelphia, T.W. Ustik 1833).

²⁵ JOHN TAYLOR, *ARATOR; BEING A SERIES OF AGRICULTURAL ESSAYS, PRACTICAL & POLITICAL* 51 (Georgetown, J.M. Carter 1814). On the history of the conflict between "property in exchange" and "property in possession," see J.G.A. POCOCK, *VIRTUE, COMMERCE, AND HISTORY* ch. 6 (1985).

²⁶ R.M. HARTWELL, *THE INDUSTRIAL REVOLUTION AND ECONOMIC GROWTH* 307 (1971).

Hence, a modern credit system requires a systematic approach to the administration of unpaid debts. Bankruptcy measures provide a means to marshal and distribute an insolvent debtor's assets among his creditors while discharging the debtor from any remaining obligations.²⁷ This mechanism has been described as a signal characteristic of economic modernity, "the result of the complex development to which modern society has attained."²⁸

The sort of modernity discerned in bankruptcy by its proponents, however, was precisely what rendered it so offensive to others. Republicans, too, saw bankruptcy as part and parcel with the consolidation of the credit system, central regulation of the economy, and the general encouragement of merchant and finance capitalism and accordingly opposed it with passion. We are an agricultural nation, they insisted; the institutions perpetrated by wicked commercial cultures have no place here, and so away with them.²⁹

On all proposed bankruptcy statutes, political and economic division followed logically. Our first bankruptcy statute, the Act of 1800, was a Federalist measure directed toward the needs of the commercial classes.³⁰ Republicans who opposed it included such luminaries as Albert Gallatin and John Randolph, both of whom denounced the Act for its effect on the landed interests.³¹ In 1803, the party of Jefferson presided over the Act's repeal.³²

No successor statute was enacted until those portions of the Whig Party

²⁷ Historically, these two functions distinguished bankrupt laws, per se from "insolvent" laws. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 389 (John M. Gould ed., Boston, Little, Brown & Co. 1896); J.F. Baker, *The Bankrupt Law—Its Provisions and Objects—Should the Law Be Repealed?*, 6 CENT. L.J. 273 (1878). The two terms have become roughly synonymous, however, with the tendency of modern statutes to combine both mechanisms within a single system of administration.

²⁸ R. McLean, *Bankruptcy Law*, 2 LAW NOTES 292, 292 (Albert Gibson ed., 1883); see also H.R. REP. NO. 5, 27th Cong., 1st Sess. (1841); CONG. GLOBE, 39th Cong., 1st Sess. 755 (1866) (remarks of Rep. Jenckes); CONG. GLOBE, 27th Cong., 2d Sess. 99 (1842) (remarks of Sen. Berrien); Adams, *supra* note 8, at 860-65; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1101, 1106 (Boston, Hilliard, Gray, & Co. 1833); Letter from James A. Bayard to Richard Basset (Feb 1, 1800), in PAPERS OF JAMES A. MADISON, 1976-1815, at 95 (Eleventh Report of the Historical Manuscripts Commission, Elizabeth Donnan ed., 1913).

²⁹ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 551 (1866) (remarks of Rep. Hastings); CONG. GLOBE app., 27th Cong., 2d Sess. 97 (1842) (remarks of Sen. Young).

³⁰ JOHN MARSHALL, 4 THE PAPERS OF JOHN MARSHALL 34 (Charles T. Cullen ed., 1984).

³¹ "[M]any planters had been choused out of their property by the operations of this very law," charged Randolph. 12 ANNALS OF CONG. 379 (1803).

³² 38 ANNALS OF CONG. 1215 (1822) (remarks of Rep. Wright); cf., CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 19-20 (1935).

"representing commercial sections of the country"³³ passed the short-lived Act of 1841.³⁴ Drafted by Daniel Webster and Joseph Story,³⁵ and championed by preeminent Whig power broker Henry Clay,³⁶ the Act came under immediate attack from congressional Democrats, who viewed this "fine, fat, plump offspring of Whig parentage"³⁷ as representative of that party's program of centralized economic planning and rapid commercial development.³⁸ That the Act of 1841 was repealed the year after its passage was perceived as a general repudiation of Whig policies.³⁹

Enacted in 1867, our third bankruptcy statute was initially intended by postbellum Republicans, the political descendants of the Whigs, as a collection tool to permit northern creditors to liquidate in federal court the assets of their southern debtors, primarily land.⁴⁰ Amended many times in an unsuccessful effort to make the Act serve the need of commerce for a settled system of insolvency relief, it was repealed in 1878 during a period of Democratic resurgence.⁴¹

Twenty more years then passed before those who saw aggregated capital as the engine of national progress, and an increasingly regulatory state as its necessary ally, obtained the permanent federal bankruptcy system they had

³³ CONG. GLOBE app., 27th Cong., 3d Sess. 187 (1843) (remarks of Rep. Rayner); *see also id.* at 188 (remarks of Rep. Rayner); THOMAS H. BENTON, THIRTY YEARS' VIEW; OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS 235 (New York, D. Appleton & Co. 1854).

³⁴ In the interim, however, the commercial classes made numerous appeals to Congress for bankruptcy relief, most energetically during periods of economic dislocation. DANIEL WEBSTER, 2 THE PAPERS OF DANIEL WEBSTER: SERIES TWO: LEGAL PAPERS 277-82 (Alfred S. Konefsky & Andrew J. King eds., 1983).

³⁵ CONG. GLOBE, 27th Cong., 1st Sess. 480 (1841) (remarks of Rep. Fillmore); WILLIAM W. STORY, 2 LIFE AND LETTERS OF JOSEPH STORY 407 (Boston, Little & Brown 1851); A.E. Pillsbury, *Suggestions on the Proposed Enactment of a Bankrupt Law*, 7 S.L. REV. 714 (1882).

³⁶ CLEMENT EATON, HENRY CLAY AND THE ART OF AMERICAN POLITICS 151 (Oscar Handlin ed., 1957).

³⁷ CONG. GLOBE app., 27th Cong., 3d Sess. 49 (1842) (remarks of Rep. Payne); *see also* CONG. GLOBE app., 27th Cong., 2d Sess. 126 (1842) (remarks of Sen. Benton).

³⁸ *See, e.g.,* CONG. GLOBE app., 27th Cong., 3d Sess. 71 (1843) (remarks of Rep. Weller); Andrew Johnson, Speech on the Admission of Oregon, Jan. 31, 1846, in 1 THE PAPERS OF ANDREW JOHNSON 282, 293 (Leroy P. Graf & Ralph W. Haskins eds., 1967).

³⁹ "I think the most unpopular law the Congress of the United States ever passed was the last bankrupt bill. It killed a party." CONG. GLOBE, 39th Cong., 1st Sess. 846 (1866) (remarks of Rep. Stevens).

⁴⁰ WARREN, *supra* note 32, at 106.

⁴¹ *Address of Robert E. Jenkins, of Chicago, Delivered Before the Illinois State Bar Association*, 27 CHI. LEGAL NEWS 58-60 (1894); Pillsbury, *supra* note 35, at 718-20.

sought for a century. The Democrats and Populists who opposed the Act of 1898 regarded its passage as confirming the ascension of an alien presence in our national life and signalling the destruction of their "real genuine America"⁴² of small towns and family farms.

Thus did the bankruptcy debate serve as a hobby horse on which two opposed ideologies galloped in place for a century. As detailed below, this controversy revealed not only the tenacity of belief systems associated with the nation's primary economic sectors but also unexpected discrepancies of understanding, intrinsic to those belief systems, with respect to ideals thought common to our citizenry. Most notably these included contrasting interpretations of the "rights" of property and contract, and the meaning of individual liberty and community in American life.

After a description of those specific effects of bankruptcy relief that rendered it emblematic of developmental capitalism, this Article employs the bankruptcy debate to analyze the ideological differences associated with the divergent and divisive economic experiences of nineteenth-century America. The final section presents the Bankruptcy Act of 1898 as the culmination of this conflict and an expression of the maturation of American capitalism.

II. BANKRUPTCY AND THE CAPITALIST PRESENCE

A. *Bankruptcy's Utility to Merchant and Finance Capital*

Bankruptcy's historical popularity with the commercial classes is attributable to its ability to promote commercial development in several ways.⁴³ First, involuntary bankruptcy, which enables claimants against an insolvent debtor to force liquidation of his estate, has often proved a more effective collection tool than such alternative remedies as attachment and garnishment.⁴⁴ Indeed, the mere threat of involuntary bankruptcy may induce the payment of

⁴² The phrase is Whitman's. WALT WHITMAN, 2 *THE UNCOLLECTED POETRY AND PROSE OF WALT WHITMAN* 35 (Emory Holloway ed., 1921).

⁴³ WILLIAM BLACKSTONE, 2 *COMMENTARIES ON THE LAWS OF ENGLAND* ch. 31 (1962); McLean, *supra* note 28, at 292. The proponents of American bankruptcy statutes have included commercial men of every degree of wealth and influence. A Detroit memorial defending the Act of 1841, for example, was signed not only by a merchant and a lawyer but also by a coppersmith, lumber merchant, printer, druggist, ship builder, ferryman, engineer, tavern keeper, sailmaker, provisioner, inspector, laborer, merchant taylor, mechanic, cabinet maker, constable, saddler, cartman, judge of probate, hatter, and the captain of the steamer Erie of Detroit. Memorial of Certain Citizens of the City of Detroit (June 19, 1841), in *Records of the U.S. House of Representatives* [hereinafter *Rec. H.R.*] 27A-G10.2, National Archives, Washington, D.C.

⁴⁴ CONG. GLOBE app., 26th Cong., 1st Sess. 545 (1840) (remarks of Sen. Strange).

debts without resort to expensive legal process. Because merchant capital is comprised primarily of expectation interests, the enforcement of timely repayment is of critical importance in supporting the interrelations of credit. "Credit depends on punctuality of payment," observed one senator in 1827:

[F]or, without this punctuality, the whole value of credit, as an instrument of commercial operation, is lost at once. To pay at the day, the merchant must depend upon being paid at the day. One beneficial effect of a bankrupt law is its operation as a powerful stimulus to this punctuality.⁴⁵

Both voluntary and involuntary bankruptcy measures have the additional salutary effect of preventing costly squabbles among creditors over their mutual debtors' property by imposing a comprehensive, equitable scheme of distribution. Under a state "grab law" regime, each creditor, fearing that he who grabs last grabs least, will incur the costs of constantly monitoring his debtors so as to be first on the ground when insolvency looms,⁴⁶ as well as litigation expenses when other creditors rush to compete for the debtor's assets.⁴⁷ This practice "is injurious to credit because it produces a feeling of insecurity and adds to what might be called the ordinary risks of business an arbitrary hazard."⁴⁸ Bankruptcy remedies this through the mechanism of "preference avoidance," which defeats the advantage of creditors who were quicker on the draw by returning their takings to the bankruptcy estate to be distributed equally among all claimants.⁴⁹

The threat of preference avoidance, moreover, discourages creditors from the premature liquidation of their collateral, and thus keeps debtors in gainful

⁴⁵ 3 CONG. DEB. 168-69 (1827) (remarks of Sen. Robbins); see also CONG. GLOBE app., 26th Cong., 1st Sess. 485 (1840) (remarks of Rep. Hubbard). As Lord Mansfield wrote: "In all mercantile transactions the great object should be certainty." *Vallejo v. Wheeler*, 98 Eng. Rep. 1012, 1017 (1774).

⁴⁶ 31 CONG. REC. 1835 (1898) (remarks of Rep. Moody); George E. Miller, *Some Features of the Uniform Bankruptcy Law*, 17 PROC. TEX. B. ASSOC. 71, 89-90 (1898).

⁴⁷ *Opposition to the Bankrupt Act*, 7 W. JURIST 503, 504 (1873). In the language of economic analysis this is a "collective pool problem." A collective pool problem exists when the economically rational behavior of claimants to joint assets conflicts with the wealth-maximizing behavior of claimants as a group. See THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986).

⁴⁸ Walter D. Coles, *The Bankrupt Law of 1898—Its Merits and Defects*, 7 AM. LAW. 283, 284 (1899).

⁴⁹ This idea was rarely formulated in exactly this way until the present century. Noel, *supra* note 4, at 188. Bankruptcy laws were always judged on their ability to enhance the group welfare of creditors through reduced collection costs. See, e.g., *Bankrupt Law*, 12 AM. L. REV. 173 (1877). The present approach to preferences is codified at 11 U.S.C. § 547 (1988).

control of assets that have greater going concern than liquidation value,⁵⁰ for example the "good will" of a business.⁵¹ This benefits creditors and debtors alike. "Does the creditor's interests lie in being able to get the first grip upon the failing debtor?" demanded one congressman in 1898; "or does his true interest lie in stimulating healthful business and keeping [his debtors] at work and saving them from financial ruin?"⁵²

Conditioning the debtor's discharge upon his full cooperation with the liquidation of his estate may be more effective than punitive measures in flushing out hidden assets.⁵³ The availability of the discharge also reduces the debtor's "perverse incentive" to incur new debts on the eve of failure in a desperate gamble to avoid the permanent financial ruin of insolvency without discharge. "It holds out a strong inducement to debtors to stop in season," stated Daniel Webster in 1840, "and to distribute their property honestly, while they have yet property to distribute, and before they have wasted it all in useless sacrifices to retrieve their affairs."⁵⁴

By limiting the financial exposure of individual venturers, a discharge regimen may encourage potentially beneficial risk-taking and the aggregation of venture capital. In this respect, it serves the same function as permissive laws of incorporation.⁵⁵ Finally, the discharge may return to economic activity individuals otherwise prostrated under the load of old debts or, in less enlightened times, confined to debtors' prison. More than charity to debtors, this has often been said to benefit the commercial world generally by adding to its effective supply of human capital.⁵⁶

For much of its history, bankruptcy was unable to combine effectively its intended functions as creditors' remedy and debtors' salvation.⁵⁷ In nineteenth-century America, the unsettled and unpredictable status of bankruptcy relief severely limited its utility to debtors. When discharge measures were passed as temporary palliatives to episodes of financial depression, moreover, creditors saw their claims erased by legislative ambush and considered this a naked

⁵⁰ H.R. REP. NO. 65, 55th Cong., 2d Sess. (1897).

⁵¹ 31 CONG. REC. 1891 (1898) (remarks of Rep. Strode).

⁵² *Id.* at 1789 (remarks of Rep. Henderson).

⁵³ This was the rationale for the first English discharge provision. 4 Anne ch. 17 (1705).

⁵⁴ CONG. GLOBE app., 26th Cong., 1st Sess. 815 (1840) (remarks of Sen. Webster); *see also id.* at 800 (remarks of Sen. Tallmadge); 38 ANNALS OF CONG. 1083-84 (1822) (remarks of Rep. Sawyer).

⁵⁵ H.R. REP. NO. 5, 27th Cong., 1st Sess. 7 (1841); *see also* WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE IN MASSACHUSETTS SOCIETY, 1760-1830*, at 63 (1975).

⁵⁶ *See infra* text accompanying notes 132-46.

⁵⁷ CONG. GLOBE app., 26th Cong., 1st Sess. 543 (1840) (remarks of Sen. Strange).

transfer of wealth from themselves to their debtors.⁵⁸ Under a stable system of debt relief, however, it is often possible to calculate the risk of nonperformance occasioned by bankruptcy and fairly allocate it among contracting venturers.⁵⁹ Put differently, bankruptcy becomes a mechanism of risk sharing, rather than risk shifting, when systematically administered.

The merchant capitalist, above all others, has seen utility in the risk management provided by bankruptcy. This perception is attributable both to his dependence on credit and to the inherent hazards of his profession. *Hunt's Merchants' Magazine* provided a brief manifesto on this point:

[Bankruptcy laws] are the natural product of commercial pursuits. The reasons are obvious. Commercial pursuits are, generally, more hazardous than any other branch of industry in which labor and capital can be invested. Commerce borrows and lends; commerce is a factor; she is also a common carrier. That which she buys and sells is subject to great and sudden fluctuations in value, involving immense losses to buyer and seller. That which she carries is often borne on a proverbially unstable element. While the possessions of the agriculturalist are as stable as the "firm-set earth" which he cultivates, those of the merchant are embarked upon the treacherous seas, with nothing but a frail, and perhaps rotten plank, between untold treasures and the fathomless depths below.⁶⁰

As repeat players, moreover, commercial lenders can take an actuarial approach to the nonperformance of individual loans.⁶¹ Their business experience and the volume of their transactions allow them, better than less practiced lenders, to factor the likelihood that some ventures will fail into the amount they charge for capital. This interest premium functions as a form of default insurance paid by the borrower.⁶²

Bankruptcy's effect of spreading risk more evenly among commercial venturers has prompted Atiyah to describe it as "collectivism" in effect.⁶³ But this is no altruistic form of collectivism. Recognizing their vulnerability to the whims of commercial chance, merchants have simply found it a sound bargain to forego claims against their insolvent debtors, often of little value in any case, for the right to obtain a like discharge in the event of their own failure.⁶⁴ In the

⁵⁸ *Report of the Committee on Commercial Law*, 19 CHL. L. NEWS 832, 834 (1887).

⁵⁹ H.R. REP. NO. 5, 27th Cong., 1st Sess. 2 (1841).

⁶⁰ *A General Bankrupt Law*, 4 HUNT'S MERCHANTS' MAG. 22 (1841).

⁶¹ Charles Biggs, *Views of the New York Credit Men's Association*, BANKR. MAG., Nov. 1897, at 55.

⁶² H.R. REP. NO. 5, 27th Cong., 1st Sess. 3 (1841); see also W.G. Maxwell, *The Rights of Debtors*, 39 ALB. L.J. 309, 310 (1889).

⁶³ P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 519 (1979).

⁶⁴ 38 ANNALS OF CONG. 1075 (1822) (remarks of Rep. Sawyer); *On a National*

case of similarly situated, long-term market participants, what is good for one is eventually good for all.

B. *The Contrasting Position of Agriculture*

Unlike the merchant, the farmer has found few benefits and many disadvantages in bankruptcy law.⁶⁵ "I do not think you could find any law ever passed or that could be passed," it was asserted in 1866, "so unpopular in an agricultural community as a bankrupt law."⁶⁶

Bankruptcy acts to marshal and distribute a debtor's estate quickly and in a cost effective manner.⁶⁷ Like contract law, it has the "abstracting habit," all property reduced to exchange values when placed on the block.⁶⁸ If merchants have been willing to accept the liquidation of their (usually highly fungible) assets as a condition of discharge, it is in the hope of then obtaining fresh credit and returning to commercial life. But credit availability to farmers has been more limited, and a yeoman who lost his homestead often faced a permanent change in status to that of wage laborer.⁶⁹ A mechanism that considers all assets as abstractions does not recommend itself to those whose relationship to particular assets cannot be severed without permanent expulsion from the marketplace.

Therefore the farm sector has historically opposed measures that render fixed assets more vulnerable to creditor's levy.⁷⁰ Involuntary bankruptcy in

Bankrupt Law, 1 AM. JURIST 35, 44 (1829). This, of course, does not apply to those entities that function primarily as commercial lenders. Hence, banks, wholesale houses, and other creditor elements were often far less favorably disposed toward bankruptcy measures than other members of the commercial community. See 31 CONG. REC. 1839 (1898) (remarks of Rep. Alexander); *Declared to Be a Miserable Compromise*, 1 NAT. BANKR. NEWS 5 (1898). Of the congressmen who voted on passage of the Bankruptcy Act of 1867, for example, those who listed their occupation as "banker" voted 1 in favor and 4 against, while "merchants" and "businessmen" voted 14 in favor and 6 against. CONG. GLOBE, 39th Cong., 1st Sess. 2743 (1866).

⁶⁵ WARREN, *supra* note 32, at 16-22; Noel, *supra* note 4, at 181.

⁶⁶ CONG. GLOBE, 39th Cong., 1st Sess. 846 (1866) (remarks of Rep. Stevens).

⁶⁷ Garrard Glenn, *A Study in the Development of Creditor's Rights*, 14 COLUM. L. REV. 279, 280 (1914).

⁶⁸ The phrase is from LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 20-21 (1965).

⁶⁹ OSCAR & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861*, at 13 (rev. ed. 1969); JOHN D. HICKS, *THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY* 84 (1961).

⁷⁰ PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* 196 (1974).

particular has earned the farmer's enmity.⁷¹ Where businessmen saw the threat of involuntary proceedings as enforcing a beneficial punctuality, to the farmer it subjected agriculture to a strict timetable of credit extension and repayment antithetical to its natural rhythms.⁷²

Involuntary measures, further, offended the republican values of the yeomanry by appearing to work a great abridgement of private liberties. That the individual citizen could be made to "cringe at the foot of a Federal judge,"⁷³ "by any jack-leg lawyer in the United States,"⁷⁴ simply because he had given a preference or fallen behind in his debts, was not to be tolerated. "The man thrown into bankruptcy," asserted a Missouri congressman in 1898, "is compelled to attend the meeting of the creditors—their servant, their lackey, their slave—there at their bidding, as an abject creature owned by them."⁷⁵ The conclusion was unavoidable that "[n]o involuntary national bankrupt law can ever be just."⁷⁶

Promises that farmers would be exempt from involuntary process never fully allayed their fears.⁷⁷ Once the forum for determining their rights was shifted from local tribunals, "over which they have more direct control [to] the distant, lofty courts under the Federal judges holding office for life"⁷⁸ previous representations might prove meaningless. The Supreme Court's expansive reading of the term "trader," to which the involuntary provisions of the 1867 Act were restricted, fueled this fear considerably.⁷⁹

Another objection of the farm sector to every proposed system of bankruptcy relief arose from the farmer's occasional status as creditor. Between imparting his crops or livestock to a factor or other middleman and the receipt of the sale proceeds, the farmer's interest in the product of his labor is merely an unsecured claim against that middleman. Should that person fail, and be

⁷¹ 12 ANNALS OF CONG. 554 (1803) (remarks of Rep. Smith); THOMAS JEFFERSON, *Thoughts on the Bankruptcy Bill* (Dec. 10, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 722 (John Calanzariti ed., 1990); Charles R. Morgan, *The Legal Origins of the Bankruptcy Act of 1800* 39–40 (1973) (unpublished M. Arts thesis, University of Virginia).

⁷² G.P. Bauer, *Imprisonment for Debt 79–80* (1935) (unpublished Ph.D. dissertation, Harvard University); N.W. Bliss, *The Torrey Bill—Redivivus* (Feb. 9, 1892), in *Records of the U.S. Senate*, [hereinafter *Rec. Sen.*] SEN 52A-J14.1, National Archives, Washington, D.C.

⁷³ 31 CONG. REC. 1803 (1898) (remarks of Rep. Henry).

⁷⁴ *Id.* at 1796 (remarks of Rep. Bell); *see also id.* at 1793–95 (remarks of Rep. Underwood).

⁷⁵ *Id.* at 6430 (remarks of Rep. De Armond).

⁷⁶ *Id.* at 1802 (remarks of Rep. Henry).

⁷⁷ *See id.* at 1862 (remarks of Rep. Linney).

⁷⁸ *Id.* at 6430 (remarks of Rep. De Armond).

⁷⁹ *Toof v. Martin*, 80 U.S. (13 Wall.) 40 (1871).

discharged from his debts under a bankruptcy statute, the farmer will share pro rata in the bankruptcy estate with other unsecured creditors, but have no further remedy.⁸⁰ The farmer has usually been in no position to calculate this risk or to adjust the price of his product accordingly. "What is this," demanded one antebellum Virginian, "but to make the farmer the perpetual insurer against every wind that blows . . . without the possibility of a premium for insurance?"⁸¹ What little return might be procured from the bankruptcy of a destitute middleman, moreover, often depended upon journeying to a distant federal court and negotiating the intricacies of its procedures. "Farmers would be slow in tackling up their wagons on such a journey, and would rather risk the loss of their debt, of which they would not be very sanguine . . ."⁸²

The conclusion that bankruptcy laws were solely for the benefit of the merchant class was commonly drawn.⁸³ When, for example, Federalist James Bayard lauded the Act of 1800 for eliminating such parochial restraints on commerce as the "feudal policy" of exempting real estate from creditor's levy,⁸⁴ a Republican delegate chided in response: "[i]f the gentleman were as well acquainted with the landed interest as with that of professional men and merchants, I believe we should have been spared the necessity of listening to much of the learned gentleman's speech."⁸⁵

III. COMPETING CONCEPTIONS OF PROPERTY AND CONTRACT

A. *Contract Under Natural Law*

In addition to conflicts of material interest, the bankruptcy debate revealed—and was sustained by—a divergence of understanding between the commercial and agricultural sectors respecting certain principals often thought to constitute ideological common ground to American citizens. First among these was the nature of property, specifically those property rights "in exchange" embodied in contracts.

Farmers have historically regarded property as something tangible to be physically held and used—primarily land and its products—its value deriving

⁸⁰ 38 ANNALS OF CONG. 1029 (1822) (remarks of Rep. Phillips); 12 ANNALS OF CONG. 550 (1803) (remarks of Rep. Bacon).

⁸¹ 38 ANNALS OF CONG. 1067–68 (1822) (remarks of Rep. Barbour).

⁸² CONG. GLOBE, 27th Cong., 1st Sess. 330 (1841) (remarks of Rep. Pope).

⁸³ See, e.g., 38 ANNALS OF CONG. 1061 (1822) (remarks of Rep. Barbour); 12 ANNALS OF CONG. 550 (1803) (remarks of Rep. Bacon); *id.* at 560 (remarks of Rep. Newton).

⁸⁴ 12 ANNALS OF CONG. 549 (1803) (remarks of Rep. Bayard).

⁸⁵ *Id.* at 551 (remarks of Rep. Bacon).

from its utility in possession. Naturally, some portion of the farmer's product will be taken to market and become temporarily property in exchange. But this process was seen as little different than straightforward barter between producers, closely circumscribed in time. Not present was the idea that an ongoing process of exchange would, of itself, generate social wealth.

To the commercial classes, on the other hand, tangible assets exist for the very purpose of exchange. They have long recognized that the process of transfer creates new forms of property, mostly debt instruments, that themselves represent real wealth and stimulate economic production in an ongoing cycle.⁸⁶ They consider property in exchange to be not only a legitimate form of property, but under some circumstances the most productive form. As the predecessor of the Dun & Bradstreet agency opined in 1876, the economic utility of property is so dependent upon its liquidity that "the hopes of a sound business superstructure must rest on the basis of . . . less fixed and more floating capital[.]"⁸⁷

To the farmer, contract rights spring directly from the tangible property created with the sweat of his brow.⁸⁸ Hence, they carry the same claim to absolute legal protection as other Lockean property entitlements. This principle was often said to stand above positive law. Denouncing a proposed bankruptcy statute in 1822, one congressman asserted:

Can Congress say that, from and after the passage of a law, a horse belonging to A shall belong to B? Such an act would be a violation of those social and fundamental principles on which the Government is based, and by which it is held together. Such an act would be not only beyond the power of a Legislature, but even a Constitution The obligations of justice and right are paramount to all others. Even the people, in their primary and collective capacity, have no power to divest individuals of their rights or property. A debt is property, and subject to the same rules⁸⁹

It followed that whenever the state obviates contract debts it directly abets a "flagrant violation of the right of property."⁹⁰

Because their contracts derive from face-to-face bargains, and address matters largely under their personal control, agriculturalists have tended toward

⁸⁶ See J.H. Balfour Browne, *Contract*, 2 AM. LEGAL REC. 11, 12 (1873).

⁸⁷ *The Failures for the Year 1875*, ANN. CIRCULAR (Office of the Mercantile Agency), January 15, 1876 at 2, in Rec. H.R. H55-F19.1, National Archives, Washington, D.C.

⁸⁸ See C. VANN WOODWARD, TOM WATSON: AGRARIAN REBEL 247 (1938).

⁸⁹ 38 ANNALS OF CONG. 799-800 (1822) (remarks of Rep. Smyth).

⁹⁰ Petition to repeal Bankrupt Law [from citizens of Montgomery County, Tenn.] (1842), and Memorial from Certain Citizens of Henry and Shelby Counties, Ky. (1843), in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.

a libertarian, "natural law" view of contract as an absolute moral obligation of the individual. "It would be admitted," opined a Virginia congressman, "as a principle of universal law, (and as universally just), that all contracts are obligatory, and must continue to have force, until performed."⁹¹ Thus agrarians did not accept any division between private morality and public policy that would permit the state to act in an instrumentalist fashion in enforcing certain contracts and not others.⁹²

B. *The Utilitarian View of Contract*

The commercial classes have never disputed that contracts are closely connected to the rights of property and deserve, as a general matter, state protection.⁹³ Indeed, nothing is more fundamental to the functioning of a market economy. They have been less likely, however, to proceed to absolutist conclusions about the inviolability of contract. The capitalist sector has adopted, instead, a more utilitarian approach toward contract, which denies that the state either could or should enforce private promises in a manner uninformed by other social concerns. This attitude derived directly from the merchant experience.

Libertarian contract doctrine, which insists that contracts are created and fully defined by the free will of the parties, must always have appeared somewhat naive to men of commerce. Given the multitude of risks attending merchant ventures, performance is never completely a matter of the will of the parties, but to some degree must remain subject to events beyond the power of human foresight to predict or control.⁹⁴ The merchant cannot deliver promised goods if his ship (literally) fails to come in. And as commerce evolves in complexity, the ability of individual merchants to perform their contracts becomes increasingly dependent on the actions of others in expanding chains of financial and legal responsibility.⁹⁵

⁹¹ 38 ANNALS OF CONG. 774 (1822) (remarks of Rep. Stevenson).

⁹² See, e.g., CONG. GLOBE app., 27th Cong., 1st Sess. 492 (1841) (remarks of Rep. Underwood).

⁹³ See, e.g., Memorial of the Louisville Chamber of Commerce (Jan. 5, 1842), in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.

⁹⁴ 38 ANNALS OF CONG. 1212 (1822) (remarks of Rep. Hill); see also CONG. GLOBE, 39th Cong., 1st Sess. 2742 (1866) (remarks of Rep. Jenckes); Michel Rosenfeld, *Contract and Justice: The Relations Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 786 (1985).

⁹⁵ When banks or other issuers of commercial paper fail, for example, so will those merchants who dealt in reliance upon their paper. Thomas Hart Benton complained that the oligarchy of banks "violate[s] all their own promises, and compel[s] others to violate theirs." CONG. GLOBE app., 26th Cong., 1st Sess. 506 (1840).

In addition, a merchant's failure to honor his promises may result directly from "acts of the Government, . . . over which the merchant had no control."⁹⁶ "There is another class of insolvents," declared Georgia's Senator Berrien, "whom misfortune . . . in many instances the action of this and other Governments on their commercial operations, not their own wild spirit of adventure, has reduced to penury."⁹⁷ The embargo of Jefferson's presidency brought ruin upon scores of traders. Sixty years later, others became insolvent when the Civil War transformed, in legal status, millions of dollars in merchant collateral into American citizens.⁹⁸ As one member of Congress reflected in 1898, such vicissitudes of history are not for the individual to predict:

There are some men who think that a man can not be a debtor and be honest, and that he must at least have been imprudent. But at the outbreak of the [Civil] war whole classes of merchants were ruined by the loss of their Southern collections. In 1873 whole communities went down because of the false valuations placed, not by the man, but by the community, upon lands and upon railroads.⁹⁹

Such observations present the state as both the rulemaker and an active participant in economic life, not the impartial referee posited by liberal theory. The implications of this are far-reaching. The effects of governmental intervention are not only substantial,¹⁰⁰ but also inherently discriminatory, for the burdens and benefits of any state action will inevitably fall unevenly. From its basic premises, however, the liberal state is proscribed from favoring the welfare of certain of its citizens over others.¹⁰¹ Thus, as the commercial classes

⁹⁶ 38 ANNALS OF CONG. 1212 (1822) (remarks of Rep. Hill); see also EDWARD CHASE KIRKLAND, *DREAM AND THOUGHT IN THE BUSINESS COMMUNITY, 1860-1900*, at 115 (1956); Memorial of Various Citizens of the State of Kentucky Against the Repeal of the Bankrupt Law (Jan. 7, 1843), in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.; Remonstrance of Cope, Todhunter & Co. and 24 Other Persons from Philadelphia Against Repeal of the Bankrupt Law (Dec. 27, 1842), in Rec. H.R. 27A-G10.3., National Archives, Washington, D.C.

⁹⁷ 3 CONG. DEB. 200 (1827) (remarks of Sen. Berrien).

⁹⁸ Abraham Lincoln, Annual Message to Congress (Dec. 3, 1861), in *COMPLETE WORKS OF ABRAHAM LINCOLN* 99 (John G. Nicolay & John Hay eds., 1920).

⁹⁹ 31 CONG. REC. 1852 (1898) (remarks of Rep. Parker).

¹⁰⁰ With respect to the rulemaking function of the state, Weber and others have denied that government can function in a wholly "transparent" way, doing no more than implementing the agreements of private parties without influencing their content. WEBER, *supra* note 14, at 173; EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 153 (W.D. Halls trans., 1984).

¹⁰¹ Ralph Lerner, *Commerce and Character: The Anglo-American as New-Model Man*, 36 WM. & MARY Q., 3d Ser. 3, 9 (1979).

were first to comprehend, it is forced into a utilitarian mode of decisionmaking and must proceed by quantifying the greatest good for the greatest number.¹⁰² "What is public justice?" by this view; answered one congressman, it is "[a] sort of conventional virtue, whose binding force is founded on principles of utility."¹⁰³

From a utilitarian standpoint, all forms of property, contract included, appear less a Lockean entitlement to the product of one's labor than an incentive to socially productive activity.¹⁰⁴ Bankruptcy exemplifies the move to regulate "in such manner as to render the use of property subservient to the public welfare."¹⁰⁵ Based upon concerns of economic efficiency, national bankruptcy administration promised to smooth the course of development, and thereby increase social wealth, by removing the impediments of an overly personalized and subjective system of debt collection.¹⁰⁶

But in concluding with Daniel Webster that "[t]he proper law-making power may act upon this relation [of contract], and alter and modify it, upon principles of general policy, justice, and utility, whenever it sees fit,"¹⁰⁷ few proponents of bankruptcy measures went so far as to dispute the contractarian

¹⁰² Indeed, this was the role of the state envisioned by Hobbes, who implicitly adopted a rule-utilitarian code. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 7 (1986); I. SHAPIRO, *EVOLUTION OF RIGHTS IN LIBERAL THEORY* 76 (1986).

¹⁰³ 38 ANNALS OF CONG. 1232 (1833) (remarks of Rep. Cushman).

¹⁰⁴ See Daniel Webster, Discourse Delivered at Plymouth, in Commemoration of the First Settlement of New England (Dec. 22, 1820), in 1 SPEECHES AND FORENSIC ARGUMENTS 48-49 (Boston, Tappan & Dennet, 8th ed. 1843); William H. Taft, *The Right of Private Property*, 3 MICH. L.J. 215, 224 (1894) ("The very advantage to be derived from the security of private property in our civilization is that it turns the natural selfishness and desire for gain into the strongest motive for doing that without which the upward development of mankind would cease and retrogression would begin.").

Compare KOHL, *supra* note 6, at 51 with DAVID HUME, *Enquiries Concerning the Principles of Morals*, in ENQUIRIES CONCERNING HUMAN UNDERSTANDING & CONCERNING THE PRINCIPLES OF MORALS 241-42 (P.H. Nidditch ed., 3d ed. 1975).

¹⁰⁵ 38 ANNALS OF CONG. 1096 (1822) (remarks of Rep. Wood).

¹⁰⁶ See, e.g., *The Bankrupt Law—The Mischief and the Remedy*, DETROIT TRIB., Feb. 25, 1876, at 1; Memorial of Certain Citizens of the State of Kentucky Against the Repeal of the Bankrupt Law (Jan. 7, 1842), in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.; Memorial of the Merchants and Traders of the Town of Boston to the Congress of the United States 2 (Dec. 27, 1819), in Rec. Sen. SEN 16A-G7, National Archives, Washington, D.C.; Petition of Manufacturing Jewelers' Board of Trade Providence, R.I. (Jan. 16, 1885), in Rec. H.R. 48A-H12.8, National Archives, Washington, D.C.; Remonstrance of Cope, Todhunter & Co. and 24 Other Persons from Philadelphia Against Repeal of the Bankrupt Law (Dec. 27, 1847), in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.

¹⁰⁷ CONG. GLOBE app., 26th Cong., 1st Sess. 814 (1840) (remarks of Sen. Webster).

foundations of American political ideology. Rather, they worked within its basic precepts to fashion a role for the state that was more flexible than that dictated by strict liberal theory.

Fortunately, requiring that state authority be premised upon the consent of the citizenry leaves much room for interpretation. For example, consent may be found implicit in conduct. In the context of promoting federal bankruptcy measures, it was sometimes argued that acceptance of the risk of default upon insolvency is at least an implicit term in all merchant dealings.¹⁰⁸ In this way, bankruptcy statutes, rather than defeating the intentions of the parties, were said to formalize the understanding of commercial venturers that their undertakings are predicated upon the uncertain hope of ability to perform when performance is due.

Following a similar logic, it was occasionally maintained that, once a bankruptcy statute is on the books, contracting parties tacitly incorporate its potential operation into their agreements.¹⁰⁹ Hence, any subsequent *repeal* of the statute will alter the terms of private contract. This theory was expounded in an exchange between Republican John Randolph and Federalist James Bayard over repeal of the Act of 1800. Randolph asserted that the Act was no different than an *ex post facto* law, in his view an offense against natural law, in that both alter the rights of individuals in a post hoc fashion.¹¹⁰ Bayard, the Act's most vigorous proponent, proceeded to turn that argument on its head:

The argument of the gentleman from Virginia [Rep. Randolph] that the bankrupt law was *ex post facto*, would not apply [he said]; but an act to repeal would in reality be an *ex post facto* law. Many merchants had entered into contracts, having an eye to the bankrupt law; many had embarked in perilous enterprises, knowing, that if they had made unfortunate calculations, that by a surrender of their effects they might again engage in commercial pursuits.¹¹¹

Although this theory addresses prospective debt relief measures, statutes having retrospective application could be similarly validated by positing that the state was granted ongoing authority to modify contractual duties in the social compact. As Justice Trimble wrote in 1827: "[W]hen men form a social compact, and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of

¹⁰⁸ See, e.g., Maxwell, *supra* note 62, at 310.

¹⁰⁹ See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827); CONG. GLOBE, 27th Cong., 1st Sess. 318 (1841) (remarks of Rep. Roosevelt); see also CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 689 (1926).

¹¹⁰ 12 ANNALS OF CONG. 377 (1803) (remarks of Rep. Randolph).

¹¹¹ *Id.* at 378 (remarks of Rep. Bayard).

the government.”¹¹² From the presence of the Bankruptcy Clause in our Constitution, it was easy to conclude that an absolute right to repayment on a debt was one of those natural law entitlements given up by Americans in forming our national union.¹¹³ This, too, was said to provide an implicit background term to all private contracts. “The possibility of dissolution on the contingency [of the passage of a bankruptcy statute] would be incident to every contract,” remarked one antebellum congressman, “an original ingredient inherent in it, and as inseparable from it as from a material object.”¹¹⁴ In 1841, *Hunt’s Merchants’ Magazine* connected explicitly the positivist view of contract with basic utilitarian principles of government:

The principle upon which political society enforces pecuniary obligations is this: individuals have surrendered the right to enforce these obligations for themselves, upon the implied undertaking of society to enforce them. Hence the political duty to enforce these obligations is imperative, and limited only by considerations relating to the general good. It will be seen that the duty is not unqualified. One broad exception to the general rule is, that society does not enforce mere *moral obligations* to pay money, although the individuals might have enforced such obligations in a state of nature. There are numerous other exceptions: for example, the contracts of married women, and minors, and contracts not evidenced by writing, and contracts expiring under the statutes of limitation, are not enforced, although the natural and moral obligations of those contracts may be perfect. Society does not, therefore, strictly enforce all the natural rights of individuals. Why not? *Because it governs itself by considerations of expediency; because the good of the few must yield to the good of the many.*¹¹⁵

Even absent express authority under social compact to obviate the *rights* of contract, it is an essential prerogative of government to alter, from time to time, the *remedies* available to contract creditors. The laws of garnishment and attachment, for example, cannot be expected to remain static in perpetuity. “The distinction between the obligation of a contract and the remedy . . . exists in the nature of things,” opined Justice Marshall in 1819; “[w]ithout impairing the obligation of the contract, the remedy may certainly be modified as the

¹¹² *Ogden*, 25 U.S. (12 Wheat.) at 319 (Trimble, J., concurring). This is the Hobbesian view of social compact, emphasizing the *giving up* of natural law rights in exchange for the benefits of organized society. THOMAS HOBBS, *LEVIATHAN* ch. 28 (C.B. Macpherson ed., 1968).

¹¹³ See, e.g., 31 CONG. REC. 1796 (1898) (remarks of Rep. Lanham); 38 ANNALS OF CONG. 1086–87 (1822) (remarks of Rep. Sawyer).

¹¹⁴ 38 ANNALS OF CONG. 1095 (1822) (remarks of Rep. Wood).

¹¹⁵ *A General Bankrupt Law*, *supra* note 60, at 31–32 (emphasis added).

wisdom of the nation shall direct.”¹¹⁶

In the bankruptcy debate, the distinction between right and remedy was extended to defend discharge measures that effectively denied creditors any practical recourse whatsoever. Bankruptcy proponents argued that such measures operate only upon legal remedies, “[a]nd though a man might be discharged from his contracts, the sense of moral obligation was not impaired—in *foro conscientoe* he was still answerable.”¹¹⁷ To those who found only cold comfort in putative “rights” they could not enforce at law,¹¹⁸ it was said that no system could fully enforce the normative dimensions of contract. To attempt to do so would be futile in some instances and would lead to the waste of public and private resources in others. There being no absolute right to repayment of debts, the proponents of commercial modernity easily concluded that the state was entitled to pass such bankruptcy measures as were necessary to “accommodate the progressive advancement of the age, the extension of trade and commerce, and the expansion of the credit system.”¹¹⁹

IV. DEBT RELIEF AND ECONOMIC FREEDOM

A. Land and the Republican Ideal of Political Freedom

Throughout the nineteenth century, Americans of all walks of life believed that legal protection for economic initiative was a requirement both of individual right and social welfare.¹²⁰ All was not harmony, however. As revealed in disputes over creditor remedies, including those provided under

¹¹⁶ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 200 (1819); *see also* *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 315 (1843). The distinction between right and remedy has been made frequently by our courts in approving legislative abridgements of the remedies previously enjoyed by creditors. William Sternberg, *Three Theories of Relief Legislation*, 24 GEO. L.J. 82, 94–95 (1935).

¹¹⁷ 10 ANNALS OF CONG. 725 (1803) (remarks of Rep. Bayard); *see also* 3 CONG. DEB. 161 (1827) (remarks of Sen. Rowan); 38 ANNALS OF CONG. 762 (1822) (remarks of Rep. Sergeant); McLean, *supra* note 28, at 293. The same distinction underlies the doctrine that an agreement to forgive a moral debt, the legal correlative to which is already discharged in bankruptcy, constitutes consideration for a new contractual benefit. *See Zaballa v. Pakel*, 242 F.2d 452 (7th Cir. 1957).

¹¹⁸ *See, e.g.*, 38 ANNALS OF CONG. 1037 (1822) (remarks of Rep. Archer) (“What was the inviolability of contract, separate from the inviolability of remedy . . .”).

¹¹⁹ CONG. GLOBE app., 26th Cong., 1st Sess. 461 (1840) (remarks of Sen. Wall); *see also* 3 CONG. DEB. 161 (1827) (remarks of Sen. Rowan).

¹²⁰ *See generally* JAMES W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* (1975).

bankruptcy statutes, the primary sectors of American life separated dramatically over what constitutes truly productive activity, and the nature of the legal protection it deserves.

To the farm sector, economic production meant the application of physical labor to land and other hard assets. When macroeconomic forces interfered with their ability to service their debts, farmers believed it appropriate to restrict creditor remedies as necessary to protect the economic contribution of the country's most productive citizens, themselves.¹²¹ Most politically charged among measures to that end were moratoria (or "stay") laws, which halt the legal collection machinery at some point prior to levy.¹²² Despite the determination of the Founders, expressed in the Contract Clause, that stay laws should be abandoned as destructive to our national credit system, the states never overcame the temptation to assist their debtors during hard times through such temporary restrictions on creditor remedies.¹²³

Stay laws appealed to the conservative ideology of agrarian republicans as much as to their material interests. As one scholar observes, moratoria are conservative forms of legislation, intended "to preserve the old order through a period of crisis."¹²⁴ Bankruptcy laws, by contrast, "clear away the debris of a previous era of overexpansion and over indebtedness: a policy based on the assumption that former times cannot be recreated."¹²⁵

¹²¹ DAVID P. SZATMARY, *SHAY'S REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* (1980).

¹²² See generally COLEMAN, *supra* note 70, at 35; JACKSON T. MAIN, *POLITICAL PARTIES BEFORE THE CONSTITUTION* 333-35 (1974); A.H. Feller, *Moratoria Legislation: A Comparative Study*, 46 HARV. L. REV. 1061, 1067 (1933).

¹²³ While some of these statutes were blatantly offensive to the Contract Clause, others attempted to artfully skirt its reach by preserving the putative rights of creditors while, in fact, making their enforcement impossible. Under an 1861 South Carolina statute, for example, creditors were permitted to take their claims to judgment, but any marshal or any other officer of the court who executed that judgment committed a criminal act. William Sternberg, *Three Theories of Relief Legislation*, 24 GEO. L.J. 82 (1935); Robert H. Skilton, *Government and the Mortgage Debtor, 1929-1939*, at 62 (1944) (unpublished Ph.D. dissertation, University of Pennsylvania); see also Comment, *The Blaisdell Decision—One Year After*, 4 FORDHAM L. REV. 73, 74 (1935); Comment, *Recent Legislation for the Relief of Mortgage Debtors*, 42 YALE L.J. 1236, 1240 (1933). The Supreme Court was historically hostile to retroactive moratoria legislation and other measures impairing a creditor's right to a quick and effective remedy. See *Walker v. Whitehead*, 83 U.S. (16 Wall.) 314 (1872); *McCracken v. Hayward*, 43 U.S. (2 How.) 608 (1844); *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843). In the 1930s, however, the Court declared permissible moratoria that included reasonable protections for creditors' interests. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

¹²⁴ Skilton, *supra* note 123, at 51.

¹²⁵ *Id.*

At least on a temporary basis, moreover, stay laws appeared to agrarians to take time out of the control of the monied interests, which subjected it to the rhythm of capitalist accumulation, and return it to the owners of the land. Because they purport to do no more than defend the *status quo*, pending return of the conditions under which debts were incurred and ought reasonably to be enforced, stay laws could be said to work no serious violation of the "sacred" rights of contract. Finally, by reducing state intervention into private life, they comported well with the *laissez-faire* bias of many agrarians.

A second form of legislation protective of property in possession, and therefore traditionally attractive to farmers, is the exemption law. Such measures shield certain categories of property, up to specified values, from attachment for debt. Early exemption statutes protected only a few tools and household goods from creditor's levy. By the 1870s, however, they had become quite extensive catalogs of socially significant property interests.¹²⁶ Beds, bibles and family portraits were often included, as were guns and military equipage. In all parts of the country, the most frequently exempted implements of economic life, however, were those necessary for family farming, such as a specified number of oxen, horses or mules, and certain basic items of farm machinery.¹²⁷ The most financially significant exemption was usually that provided for land as a family homestead.¹²⁸

Moratoria laws and homestead and other exemptions protected from the machinery of the market economy those relationships between Americans and their property considered most essential to our national well-being. Deeply republican forms of legislation, they reflected a belief that national prosperity and virtue were best served when the populace was engaged in the production of tangible wealth from the land. The conflict between these forms of legislation and federal administration of insolvency, which would permit State law protections of property to be "construed, and allowed or disallowed, by these Federal judges far removed from the people," was readily apparent and fueled opposition to all proposed bankruptcy acts.¹²⁹

¹²⁶ WARREN, *supra* note 32, at 110.

¹²⁷ *State Exemption Laws*, 1 GAZETTE AND BANKRUPT CT. REP., Aug. 1, 1867, at 9-10.

¹²⁸ Many statutes discriminated between town and rural homesteads in a way that favored the latter. 31 CONG. REC. 1910 (1898) (remarks of Rep. Lloyd); *State Exemption Laws*, *supra* note 127, at 9, 11.

¹²⁹ See 31 CONG. REC. 6431 (1898) (remarks of Rep. McRae).

B. *The Freedom to "Truck, Barter, and Exchange"*

Men of commerce believed as fully as did agrarians that a love of unrestrained economic activity is fundamental to the American character. "[N]o one will deny, that the greatest possible exemption from personal restraint bears the closest analogy to the common sentiments and habits of Americans," stated a group of Boston merchants in 1819, "and is highly congenial to that pure and equal spirit of liberty which animates our whole civil and political character."¹³⁰ They also agreed that this propensity, when given its head, redounds to the public good. Unlike agrarians, however, they did not equate beneficial economic activity solely with the application of individual labor to tangible assets. As mentioned, they saw transactions of exchange, even transfers of "paper" wealth, as contributing to the liquidity and allocative efficiency of our capital stock and, hence, to its productive capability.

It followed that the minions of commerce were to be cherished for their restless, striving energies, so beneficially directed.¹³¹ "The world is a vast storehouse of energy," opined one writer in 1889: "The whole genius of man is constantly operating upon Nature to wrest from her as much as possible, and in this warfare no helpful agency should be extinguished nor any individual crippled. Every businessman is an agent in the great work."¹³² Others went so far as to that assert that "most of the great enterprises and improvements of our country are mainly due to [the merchant's] energy and spirit of enterprise."¹³³

Hence the need for federal administration of insolvency. By eliminating a patchwork of state regulations, it would knock down provincial barriers to commerce and "give the largest value to individual liberty and to individual activity, in order to make the whole of this vast country the theater of every citizen's activity and enterprise and energy."¹³⁴

Bankruptcy law would also promote individual liberty and productivity through its discharge mechanism. By exempting future profits from the claims of their creditors, those "harpies who consume the very beginnings of accumulation," bankruptcy would free insolvent merchants from the bondage

¹³⁰ Memorial of the Merchants and Traders of the Town of Boston to the Congress of the United States (Dec. 27, 1819), in Rec. Sen. SEN 16A-G.7, National Archives, Washington, D.C.

¹³¹ See 31 CONG. REC. 1798 (1898) (remarks of Rep. Lanham).

¹³² Maxwell, *supra* note 62, at 310.

¹³³ Memorial of J. Nelson Guekey and Other Citizens of New York, Praying for the Passage of a Bankruptcy Law (Mar. 1862), in Rec. H.R. 37A-G21.2, National Archives Washington, D.C.

¹³⁴ 16 CONG. REC. 460 (1885) (remarks of Rep. Potter); see also CONG. GLOBE app., 27th Cong., 1st Sess. 471 (1841) (remarks of Rep. Fessenden).

of debt to return to commercial activity.¹³⁵ Explained one Whig congressman:

It is by employing capital . . . that profits are made beyond what are indispensable for personal support. And all this is forbidden to the debtor; since, so long as he is unprotected by a discharge, some one creditor or another, armed with the power of the courts, stands ready to seize every solitary surplus dollar which he may chance to find in the debtor's possession.¹³⁶

Always it was emphasized that any measure effecting the resurrection of "financially dead" businessmen would benefit not only those individuals but, by replacing their shoulders to the great economic wheel, the public as well.¹³⁷ The object of bankruptcy, stated the *American Jurist*, "is to unfetter and promote the industry and enterprise of our population."¹³⁸ "It is not [debtors] only who are interested in the matter," advised one legislator in 1840, "the country has an interest in their activity, and industry, and talents, that they may be again set free to add to its general wealth and prosperity."¹³⁹ Stated a Massachusetts senator of the Act of 1841: "[I]t will quicken every spindle, and put money in the pocket of every shoe manufacturer and hat manufacturer among [our] people."¹⁴⁰

Together with the energies of commercial debtors, their property too would remain productively employed under a bankruptcy regimen, because debtors would have less incentive (and opportunity) to hide assets from creditors. "If property must be concealed from the view of the world, and can be used only in secret, it loses almost entirely its value,"¹⁴¹ both to its owner

¹³⁵ CONG. GLOBE app., 27th Cong., 1st Sess. 430 (1841) (remarks of Rep. Nisbet); *id.* at 498 (remarks of Rep. Barnard). Similarly, see Miller, *supra* note 46, at 77.

¹³⁶ CONG. GLOBE app., 27th Cong., 1st Sess. 498 (1841) (remarks of Rep. Barnard).

¹³⁷ See, among hundreds of other possible examples, CONG. GLOBE, 39th Cong., 1st Sess. 2742 (1866) (remarks of Rep. Jenckes); CONG. GLOBE app., 27th Cong., 2d Sess. 99 (1842) (remarks of Sen. Clay); CONG. GLOBE app., 26th Cong., 1st Sess. 460 (1840) (remarks of Sen. Wall); *Id.* at 836 (remarks of Sen. Smith); 3 CONG. DEB. 171 (1827) (remarks of Sen. Robbins); Memorial of the Legislature of the State of Minnesota for a General Bankrupt Act (Feb. 7, 1863), in Rec. H.R. 37A-G21.2, National Archives, Washington, D.C.; Memorial of the Merchants and Traders of the Town of Boston to the Congress of the United States (Dec. 27, 1819), in Rec. SEN 16A-G7, National Archives, Washington, D.C.; Opposition to Repeal or Postponement of the Bankrupt Law [from Certain Citizens of New York] (Feb. 14, 1842), in Rec. H.R. 27A-G10.3., National Archives, Washington, D.C.

¹³⁸ *On a National Bankrupt Law*, 1 AM. JURIST 35, 49 (1829).

¹³⁹ CONG. GLOBE app., 26th Cong., 1st Sess. 345 (1840) (remarks of Sen. Clayton).

¹⁴⁰ CONG. GLOBE app., 27th Cong., 2d Sess. 106 (1842) (remarks of Sen. Choate).

¹⁴¹ Miller, *supra* note 46, at 89.

and to a nation poor in capital goods. This was often a problem with respect to provincial debtors, who were well positioned to conceal assets from distant lenders. A northern congressman complained in 1841 that the assets of southern debtors were commonly "put into a napkin and buried up in the earth . . . [and thus] lost to business, lost to commerce, lost to trade, lost to manufactures, and to all useful purpose."¹⁴² A national bankruptcy statute, he believed, "would disinter those assets from their burial place."¹⁴³

The "financial death" concept was closely linked to appeals to view commercial failure not as the mark of dishonesty or incompetence, meriting punishment, but instead a matter of personal misfortune,¹⁴⁴ or even proof of an adventurous spirit worthy of encouragement.¹⁴⁵ Commerce advances through trial and error, insisted its spokesmen, and "Americans, who have turned rash speculation into a sort of virtue, can in no case stigmatize those who are thus rash."¹⁴⁶ As *Hunt's Merchants' Magazine* explained:

The American people are proverbially enterprising; and a facility for obtaining credit, co-operating with a temperament active and sanguine, constantly tempts to enterprises of peculiar hazard, and oft-times singularly disastrous in their results. These losses fall heavily on individuals; but the ardent and enterprising spirit which encounters great labors and hazards for the sake of probable, sometimes only possible success, is no doubt the source of our unparalleled growth and prosperity.¹⁴⁷

To the commercial groups, the salvation through bankruptcy of "citizens lost to themselves, lost to their country,"¹⁴⁸ was a truly progressive prospect. They saw it in much the same light as the elimination of imprisonment for debt.¹⁴⁹ Orated one member of Congress in 1841:

¹⁴² CONG. GLOBE app., 27th Cong., 2d Sess. 179 (1841) (remarks of Sen. Choate).

¹⁴³ CONG. GLOBE app., 27th Cong., 1st Sess. 480 (1841) (remarks of Sen. Choate).

¹⁴⁴ *Id.*; Public Meeting at Syracuse in Favor of the Passage of a General Bankrupt Law (June 24, 1841), in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.

¹⁴⁵ See, e.g., 31 CONG. REC. 1909 (1898) (remarks of Rep. Lewis); 12 ANNALS OF CONG. 551 (1803) (remarks of Rep. Eustis); 3 CONG. DEB. 170 (1827) (remarks of Sen. Robbins); Hon. George W. Ray, *Add to the Dignity and Wealth of Our Country*, BANKR. MAG., Apr. 1898, at 44.

¹⁴⁶ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 622 (J.P. Mayer ed., 1969).

¹⁴⁷ *A General Bankrupt Law*, *supra* note 60, at 23; see also Charles Edwards, *What Constitutes a Merchant?*, 1 HUNT'S MERCHANTS' MAG. 289 (1839).

¹⁴⁸ 3 CONG. DEB. 170 (1827) (remarks of Sen. Robbins).

¹⁴⁹ See CONG. GLOBE, 39th Cong., 1st Sess. 2742 (1866) (remarks of Rep. Jenckes); CONG. GLOBE app., 27th Cong., 1st Sess. 480 (1841) (remarks of Rep. Brown); 38 ANNALS

The obligations of the debtor does [sic] not include the forfeiture of all the rights which belong to humanity. Honest misfortune has its penalties, which are grievous enough; but it is no part of such penalty to doom the debtor to the most odious slavery that the human imagination can conceive—a slavery a thousand times more deplorable than that of the Helotes of old, the villeins of feudality, or the serfs of modern despotism, the perpetual slavery of debt, which enervates and subdues the mind, at the same time that it condemns the body to a perpetual thralldom, which can look to no emancipation but the last refuge of suffering humanity—the grave.¹⁵⁰

The “slavery” of hopeless indebtedness and the “feudal” relations between debtor and creditor it created were frequently adverted to as the hallmarks of an older, oppressive social order, properly cast out by a free people.¹⁵¹ Bankruptcy measures thus became symbolic of the democratic and egalitarian component of American capitalist thought, directly supporting the link between individual economic freedom and social welfare.

V. TWO VISIONS OF COMMUNITY

A. *The One Genuine America*

Both the agricultural and commercial sectors viewed their activities as fundamental to a community of interests presently existing and national in scope. Yet their conceptions of community, as articulated in the bankruptcy debate, bore little resemblance to each other. To those in the republican tradition, community was comprised of a population of independent freeholders with a stable relationship to the land and their neighbors, united in a common experience of family farming and a roughly equivalent material status. This egalitarian, conservative and essentially localistic conception of community told forcefully against bankruptcy legislation.

By letting off too easily those sharp characters whose schemes resulted in the failure they so richly deserved, bankruptcy threatened to: “stimulate the spirit of speculation almost to madness.”¹⁵² This would bring about great

OF CONG. 1210 (1822) (remarks of Rep. Hill).

¹⁵⁰ CONG. GLOBE app., 26th Cong., 1st Sess. 462 (1840) (remarks of Sen. Wall); *see also* STORY, *supra* note 28, § 1106.

¹⁵¹ *See* 31 CONG. REC. 1893 (1898) (remarks of Rep. Connolly); CONG. GLOBE app., 26th Cong., 1st Sess. 543 (1840) (remarks of Sen. Strange); *id.* at 818 (remarks of Sen. Clay); 38 ANNALS OF CONG. 1115 (1822) (remarks of Rep. Woodson); Maxwell, *supra* note 62, at 309.

¹⁵² CONG. GLOBE app., 27th Cong., 1st Sess. 206 (1841) (remarks of Sen. Buchanan); *see also* CONG. GLOBE app., 26th Cong., 1st Sess. 505 (1840) (remarks of Sen. Benton); 38

disparities in wealth, undermining the stability of local society and inevitably promoting in influence those elements identified not with traditional values but the hollow promise and the unearned dollar.¹⁵³ Stated certain New Hampshire memorialists of the Act of 1841: "[it would] encourage wild and numerous speculations . . . assumes to violate solemn contracts, and deprive the industrious and prudent portion of our citizens, of a legal right to the earnings of their industry, to benefit a class of people, composed to a great extent of the idle and extravagant."¹⁵⁴

Bypassing the concerns of the "one genuine America" of small towns and family farms to serve the monied interests, bankruptcy appeared an odious form of "class legislation [which] should be abhorred as a demon seeking the destruction of our Republic."¹⁵⁵ Echoing Jefferson's dictum that merchants "have no country,"¹⁵⁶ a South Carolina congressman derided as follows the idea of favoring that group to which we, as a nation, owe the least:

If a distinction is made [on the subject of debt relief], ought it not to be made in favor of the agricultural class? Who constitute the country? Who give Government its strength and its fastenings? Who feed the public Treasury? Who fill and command our armies of defense; lend wings to our navy, and supply commerce with its aliments. [And not the] merchant, *a man of every country and of no country; who is perfectly indifferent whether the sun rises on him to the north or the south of the equator*; whose attachments and hopes are regulated by the price currents which he daily receives, or who estimates the worth of every man, not by his virtue but by the balance in his ledger. I speak of them as a class. Are they the persons on whom we are to rely and whom we are to privilege?¹⁵⁷

Such statements emphasized the *alien* quality that republicans discerned in the capitalist classes. Accepting a corrupt calculus of individual gain as an adequate basis for private conduct, members of no community except the camp-followers of the Almighty Dollar, capitalists were a variety of men "who have

ANNALS OF CONG. 960 (1822) (remarks of Rep. Mallery).

¹⁵³ 31 CONG. REC. 1803 (1898) (remarks of Rep. Henry); *Commentary*, 3 LAW NOTES 202 (1900).

¹⁵⁴ New Hampshire: Petition from 412 Citizens of Coos County for the Repeal of the Bankrupt Bill (Dec. 30, 1841), in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.

¹⁵⁵ 31 CONG. REC. 1802 (1898) (remarks of Rep. Hay).

¹⁵⁶ Jefferson's observation drew, in turn, from ADAM SMITH, *THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 395 (Edwin Cannan ed., 1937). See Andrew Jackson, *Veto Message*, in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1467 (Richardson ed., New York, Bureau of National Literature 1896).

¹⁵⁷ 38 ANNALS OF CONG. 1023 (1822) (remarks of Rep. Mitchell) (emphasis added).

preyed upon and destroyed all previous civilizations . . . whose moral sense is destroyed by the business in which they are engaged."¹⁵⁸ Having slipped the moorings of social tradition, they appeared to be outside the pale of American community.

Because the interests of merchant and finance capitalists were not perceived as those of the American public, it was easy for those in the republican tradition to discern the mark of "corruption" in any measure drafted for their benefit. "When demand was made for measures invading the spontaneous distribution of property of industry," stated one congressman in 1822, "or asserting despotic control of legislative power over contract . . . whether the measures were bank bills, or tariff bills, or bankrupt bills, the demand had but one source, the influence of some private interest or distress."¹⁵⁹ The Act of 1841, for example, was seen as an example of the ability of the commercial classes, and in particular "a *clique of bankrupt speculators* in the city of New York,"¹⁶⁰ to corrupt the democratic process. One Jacksonian Democrat charged:

[The statute] was passed under very peculiar circumstances. At the extra session, after the bill had been laid on the table (where every one supposed it was destined to sleep the sleep of death) by a decisive majority, the Whig members here were entertained that evening at a certain board [Daniel Webster's], where the sparkling champagne flowed pretty freely . . . and, in the twinkling of an eye this bill . . . was passed.¹⁶¹

As the century progressed, corporations eclipsed merchant capitalists as the primary threat perceived by republicans to the traditional values and the economic stability of local community.¹⁶² These, too, appeared favored by federal power. Causing particular distress was the manner in which the postbellum federal courts exerted equitable jurisdiction over railroad insolvencies¹⁶³ in a manner favoring management and equity interests over

¹⁵⁸ 31 CONG. REC. 2317 (1898) (remarks of Rep. Stewart).

¹⁵⁹ 38 ANNALS OF CONG. 983 (1822) (remarks of Rep. Archer).

¹⁶⁰ Petition to Repeal the Bankrupt Law from Citizens of New York (Jan. 20, 1842) in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.

¹⁶¹ CONG. GLOBE app., 27th Cong., 3d Sess. 70 (1843) (remarks of Rep. Weller); see *id.* at 74 (remarks of Rep. Kennedy). This controversy was recalled at length at 31 CONG. REC. 1856-58 (1898) (remarks of Rep. Dolliver).

¹⁶² See Louis Galambos, *The Agrarian Image of the Large Corporation, 1879-1920: A Study in Social Accommodation*, 28 J. ECON. HIST. 341 (1968); *Causes of Agricultural Unrest*, ATLANTIC MONTHLY, Nov. 1896, at 577.

¹⁶³ See ALFRED D. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 134-71 (1977); HAROLD U. FAULKNER, *THE DECLINE OF LAISSEZ-FAIRE* 24 (1951).

local shippers.¹⁶⁴ This, of course, was recalled when it was proposed that federal insolvency jurisdiction be enlarged by statute. In opposition to the Act of 1898, the case was made that, whereas the federal courts had previously contented themselves with managing railroads, "now it is proposed to enlarge their business, to make them vast department stores, in which everything can be bought and every business conducted, from a railroad down to a peanut stand."¹⁶⁵ This would permit the federal courts to "take control of the local affairs of the people of this country . . . to build up alien power for the protection, not of the poor, but of monopolies, trusts, and combines."¹⁶⁶

Bankruptcy's administrative machinery was believed not only to serve corrupt interests, antithetical to the bedrock values of traditional community, but indeed to create them—in the form of those bureaucratic functionaries who were the traditional nemeses of republican virtue.¹⁶⁷ Much was heard from the

¹⁶⁴ Specifically, the federal courts' adoption of the principle of "reasonable return on investment" in receivership situations effectively shifted losses caused by overbuilding and general mismanagement from investors to the public. The federal courts demonstrated little sensitivity to the effects that even small differentials in freight charges could have on producers with distant markets, and thwarted in significant ways both federal and state attempts to regulate railroads in keeping with a more populist sensibility. As one Alabama congressman remarked:

We know that every time these corporations go into the hands of a receiver they are reorganized and come out with more stock and more bonds placed on the railroad. What is the result? The men who reorganize them first get their rake-out, and then the people along the railroad who raise the wheat, raise the cotton, and pay the freight have to pay higher rates of freight in order to pay for the increased interest charges on additional stocks and bonds that have been issued under the reorganization plan.

31 CONG. REC. 1795 (1898) (remarks of Rep. Underwood); *see also* MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 425-27 (1977); EDWARD C. KIRKLAND, *INDUSTRY COMES OF AGE* 72 (1945); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, at 82 (1967); *cf.* William H. Taft, *Recent Criticism of the Federal Judiciary*, 5 COUNSELLOR 59 (1895). The histories of a number of individual reorganizations are provided in STUART DAGGERT, *RAILROAD REORGANIZATION* (1908).

¹⁶⁵ 31 CONG. REC. 1940 (1898) (remarks of Rep. Bodine).

¹⁶⁶ *Id.* at 1896 (remarks of Rep. Bland); *see also id.* at 1795 (remarks of Rep. Bell); *id.* at 1939 (remarks of Rep. Bodine); *id.* at 1793, 1795 (remarks of Rep. Underwood); *id.* at 1838 (remarks of Rep. Settle); *id.* at 1851 (remarks of Rep. Sparkman). A North Carolina congressman concluded: "[A] proposition separate and distinct to enlarge the jurisdiction of the Federal courts would find fewer advocates among the thinking people of this Republic than almost any other proposition that could possibly be submitted to them." *Id.* at 1862 (remarks of Rep. Linney).

¹⁶⁷ *Id.* at 6430 (remarks of Rep. De Armond).

opponents of bankruptcy law about "the nibbling of mice that infest bankrupt courts and eat all up for their own benefit,"¹⁶⁸ those magistrates and assignees, together with their "train of lazy dependents,"¹⁶⁹ in whose care a bankruptcy estate would suffer the same fate as a lump of butter in the mouth of a dog.¹⁷⁰ The elaborate fee structure of the 1867 Act was particularly distasteful to those who feared the corrupting spread of dependence upon the government largess. Recalling its operation, one congressman lamented in 1898: "[O]nly God Almighty can find a way to relieve us from pillage by the fee fiend."¹⁷¹

Held up as the most rapacious variety of courthouse vermin, however, were the members of the bar. "[T]hose who took their grists to the mills where lawyers took the toll," concluded one House Democrat in 1841, "would have but little reason to thank the mills or the millers."¹⁷² Motivated purely by prospects of personal gain, and immune to any sense of social responsibility, lawyers would do all within their power to disrupt the harmony of interests essential to a stable and virtuous republic. "All the army of champertors who have ever exercised their diligence in stirring up litigation for gain," warned a southern congressman of the 1898 Act, "would sink into comparative insignificance in comparison with the influence of this bill as a stirrer up of strife, a scatterer of firebrands."¹⁷³

Even those who did not see federal courts as sinkholes of corruption, moreover, feared they would destroy an element of the personal in economic life. "In the State courts," observed the *American Lawyer*, "jurors nearly always know the local parties."¹⁷⁴ In the federal courts, on the other hand, "[t]he judges have a life tenure, the districts are large, the jurors and marshals and court officers seldom know the suitors even by sight."¹⁷⁵ This bureaucratic regime would thwart any hope of addressing business failure in a manner that

¹⁶⁸ *Id.* at 1894 (remarks of Rep. Connolly).

¹⁶⁹ 38 ANNALS OF CONG. 1021 (1822) (remarks of Rep. Mitchell).

¹⁷⁰ CONG. GLOBE, 26th Cong., 1st Sess. 504 (1840) (remarks of Sen. Benton) (recalling a remark by John Randolph).

¹⁷¹ 31 CONG. REC. 1809 (1898) (remarks of Rep. Cochran); *see also* 16 CONG. REC. 462 (1885) (remarks of Rep. Willis).

¹⁷² CONG. GLOBE app., 27th Cong., 1st Sess. 209 (1841) (remarks of Rep. Gordon); *see also* 31 CONG. REC. 1864 (1898) (remarks of Rep. Love); CONG. GLOBE, 39th Cong., 2d Sess. 1189 (1867) (remarks of Rep. Cragin); CONG. GLOBE, 27th Cong., 1st Sess. 330 (1841) (remarks of Rep. Pope).

¹⁷³ 31 CONG. REC. 1862 (1898) (remarks of Rep. Linney); *see also id.* at 2315 (remarks of Sen. Stewart).

¹⁷⁴ Henry Wollman, *The New Bankruptcy Law—Its Inadequacies and Shortcomings*, 6 AM. LAW. 410, 411 (1898).

¹⁷⁵ *Id.*

reflected the personal dimension of community.¹⁷⁶ Asserted an opponent of the 98 Act: “[i]t eliminates sentiment and reduces business to a cold-blooded proposition.”¹⁷⁷

In sum, the republican detestation of federal bankruptcy administration derived from a general fear that it would prove the entering wedge for the intrusion of “centripetal”¹⁷⁸ power into local affairs, resulting in the destruction of the traditional values and social structures upon which true community was founded.¹⁷⁹ “The tendency toward centralization,” it was said in Congress in 1898, “is and has been rapid enough without encouraging it in this manner.”¹⁸⁰

B. *The Community of Enterprise*

While to republicans community entailed harmony in uniformity, the capitalist groups celebrated interdependence in diversity. As the latter saw it, Americans were as varied in station and occupation as their imaginations and energies would permit, yet were nevertheless bound together as one people by a shared spirit of enterprise and a need to cooperate in the development of a rich and complex economy. We are “a highly commercial country,” insisted Daniel Webster, “and a highly commercial and enterprising age.”¹⁸¹ The line between “genuine” Americans and others did not separate farmer from merchant but, as one congressman stated, “the lazy, the shiftless, the drones” from:

the great mass of our population, made up of active, intelligent, industrious, and energetic men and women. This class is engaged in business of some kind. The individual members are thinkers, workers, and doers. When young and hopeful, they borrow capital, start business, set factory wheels in motion, and make things hum. Others buy the farm on credit, and the lowing of cattle, the bleating of sheep, and the singing of the mower and the rattle of the reaper tell

¹⁷⁶ Wrote the editor of the *Farmer's Advocate* to his congressman in 1898: “[h]onest debtors can usually compromise with fair-minded creditors and save large expenditures in legal proceedings that had better be left in the hands of debtor and creditor than put in the hands of emmisarys [sic] of the law.” Letter from L.H. Weller to Rep. D.B. Henderson (1898), in Rec. Sen. 52.A-J14.1., National Archives, Washington, D.C.

¹⁷⁷ *Views on the Bankrupt Law*, 1 NAT'L BANKR. NEWS 166 (1898).

¹⁷⁸ 2 CONG. DEB. 676 (1826) (remarks of Rep. Randolph).

¹⁷⁹ Thus opposition to bankruptcy measures was “not directed against the bankrupt system particularly; it [had] for its object, every exercise of power by the general government[.]” *On a National Bankrupt Law*, *supra* note 138, at 49.

¹⁸⁰ “Remarks of Elija B. Lewis,” quoted in BANKR. MAG., Mar. 1898, at 7.

¹⁸¹ CONG. GLOBE app., 26th Cong., 1st Sess. 814 (1840) (remarks of Sen. Webster).

the world that business is being done.¹⁸²

A line of thought as old as the commercial revolution posits that the strands of mutual dependence created by commerce promote general harmony,¹⁸³ the intensely social dynamic of market relations fostering a spirit of cooperation and a sensitivity to the wants of others.¹⁸⁴ De Tocqueville observed that "Trade is the natural enemy of all violent passions. Trade loves moderation, delights in compromise, and is most careful to avoid anger."¹⁸⁵ Thus commerce is the great bond of community.

However individuals might feel about the social mores associated with commerce, moreover, the expansion and consolidation of a national market economy was often asserted to be a matter of universal practical necessity.¹⁸⁶ Was it not of concern to all alike that interest and freight rates be low, goods cheap and plentiful, and that employment opportunities expand? The commercial elements were certain of it. "The interests of every portion of the country are reciprocal," they insisted.¹⁸⁷ Even farmers did not stand apart from this "great law of mutual dependence,"¹⁸⁸ for the promotion of trade could only lead to greater markets for their produce. "Show me a regulation by which commerce is to be advanced," proclaimed one Senator in 1827, "and you show me that by which agriculture is to be promoted."¹⁸⁹

While republicans cherished a localistic conception of American community, the proponents of commercial modernity thought continentally and presented themselves as taking up the torch of commercial unity lighted at our

¹⁸² 31 CONG. REC. 1914 (1898) (remarks of Rep. Ray). Ray was the primary author of the 1898 Act.

¹⁸³ On the early history of this position, see ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1977) and POCOCK, *supra* note 10, at 115. For other applications to the American context, see R. KENT NEWMAYER, *SUPREME COURT JUSTICE JOSEPH STORY* 137 (1985) and DANIEL W. HOWE, *POLITICAL CULTURE OF THE AMERICAN WHIGS* 101 (1979).

¹⁸⁴ 38 ANNALS OF CONG. 1098 (1822) (remarks of Rep. Wood). For a recent formulation of this view, see Thomas L. Haskell, *Capitalism and the Origins of the Humanitarian Sensibility, Part 2*, 90 AM. HIST. REV. 547 (1985).

¹⁸⁵ DE TOCQUEVILLE, *supra* note 146, at 637.

¹⁸⁶ See KOHL, *supra* note 6, at 64 (1989); see also CONG. GLOBE app., 26th Cong., 1st Sess. 542-44 (1840) (remarks of Sen. Strange).

¹⁸⁷ CONG. GLOBE app., 25th Cong., 1st Sess. 796 (1840) (remarks of Sen. Webster) ("In my judgment, all interests concur."); CONG. GLOBE app., 27th Cong., 1st Sess. 469 (1841) (remarks of Sen. Tallmadge); see also WATSON, *supra* note 9, at 244.

¹⁸⁸ Calvin Colton as quoted in KOHL, *supra* note 6, at 80.

¹⁸⁹ 3 CONG. DEB. 204 (1827) (remarks of Sen. Hayne).

nation's birth.¹⁹⁰ Bankruptcy and other measures to create a national economic structure were, to them "part of a great and wise commercial system" consonant with the spirit of enterprise at the root of our national character and fundamental to the growth of national community.¹⁹¹ As one member of Congress foretold in 1822:

[C]ould we be permitted to look into the vista of futurity, and behold the high destinies of the Republic, stretching its protecting arms and extending the influence of its Constitution and its laws to its free and happy citizens scattered through its vast regions from the Atlantic to the Pacific Ocean, engaged in social intercourse, and conducting their increasing commercial operations, facilitated by internal improvements, the necessity of uniformity in our laws would still be more apparent.¹⁹²

If the spread of commercial culture would entail the destruction of local traditions and established ways of thinking, moreover, the proponents of Progress viewed such matters as more often grounded in ossified prejudice than in reasoned values.¹⁹³ "Every important change in our social condition must meet with opposition," stated one Whig congressman; "[i]t breaks in on previously formed opinions and long-established habits of thinking, and must therefore be for a while viewed with distrust, and regarded by some as a troublesome intruder."¹⁹⁴

In its emphasis on transformation as progress, the linear development in time of American society, capitalist ideology was dynamic while republicanism

¹⁹⁰ See 31 CONG. REC. 1847 (1898) (remarks of Rep. McCall); 38 ANNALS OF CONG. 1122 (1822) (remarks of Rep. Woodson); Edwards, *supra* note 147, at 289; *The Bankrupt Act—Shall It Be Repealed?*, 1 CEN. L.J. 1 (1874); *A General Bankrupt Law*, *supra* note 60, at 23; see also THE FEDERALIST NO. 42 (James Madison).

¹⁹¹ CONG. GLOBE app., 27th Cong., 1st Sess. 480 (1841) (remarks of Rep. Brown); see also REPORT OF A SPECIAL COMMITTEE AND ACTION BY THE [NATIONAL] BOARD [OF TRADE] CONCERNING THE BAILEY BILL AND THE TORREY BANKRUPT BILL, S. MISC. DOC. NO. 83, 53d Cong., 2d Sess. 8 (1894); CONG. GLOBE app., 27th Cong., 1st Sess. 469 (1841) (remarks of Rep. Tallmadge); *id.* at 471 (remarks of Rep. Fessenden); CONG. GLOBE app., 26th Cong., 1st Sess. 544 (1840) (remarks of Sen. Strange); *id.* at 803 (remarks of Sen. Dixon); 3 CONG. DEB. 169-70 (1827) (remarks of Sen. Robbins); 38 ANNALS OF CONG. 1126 (1822) (remarks of Rep. Woodson); *On a National Bankrupt Law*, *supra* note 138, at 36; Memorial of the Chamber of Commerce of New Haven, Conn. (Jan. 4, 1820), in Rec. SEN. 16A-G7, National Archives, Washington, D.C.; Memorial of Some 600 Citizens of Baltimore Praying Against the Repeal of the Bankrupt Law (Jan. 18, 1842), in Rec. H.R. 27A-G10.3, National Archives, Washington D.C.

¹⁹² 38 ANNALS OF CONG. 1126 (1822) (remarks of Rep. Woodson).

¹⁹³ HOWE, *supra* note 183, at 100-03.

¹⁹⁴ CONG. GLOBE app., 27th Cong., 1st Sess. 482 (1841) (remarks of Rep. Brown).

was static. So did Henry Clay, author of the "American System" of internal improvements and assistance to industry, opine that the commercial and industrial "system" reflects an "avidity for improvement," whereas an agricultural system is characterized by "inertia."¹⁹⁵ Indeed, progress was so esteemed by those in the Hamiltonian tradition as to justify a process of regulatory trial and error.¹⁹⁶ In support of the Bankruptcy Act of 1841, a Whig delegate proposed:

Let us have a launch, I say; let us get this measure afloat; and when the craft is once riding on its destined and proper element, if then, we find dangerous leaks or manifest imperfections, which we shall then be better able to discover, it will be an easy thing to haul up for repairs and improvement.¹⁹⁷

An irrepressible social optimism undergirded this belief in constructive (and constructed) change as the foundation of American community. So great was the promise of "improvement" offered by our rich continent, and so confident were the proponents of progress in their ability to exploit that promise, that the traditional values and settled relationships cherished by republicans could be discarded without regret whenever they proved an impediment. Static conceptions of community, in their view, held no attractions to match those of the dynamic, national community of interest that lies in pursuing Progress.

C. Preference Law and the Bonds of National Community

Within the bankruptcy debate, the divergence of views as to the time and space dimensions of American community was given its most thorough exposition on the subject of preferential payments, permitted in insolvency situations by most States, but set aside in federal bankruptcy proceedings.¹⁹⁸ Preferences, it was said, discouraged the growth of a national credit market by

¹⁹⁵ HENRY CLAY, Speech on the Tariff, in 2 THE PAPERS OF HENRY CLAY: THE RISING STATESMAN 831 (James F. Hopkins ed., 1959).

¹⁹⁶ 31 CONG. REC. 1853 (1898) (remarks of Rep. Parker).

¹⁹⁷ CONG. GLOBE app., 27th Cong., 1st Sess. 498 (1841) (remarks of Rep. Barnard). The alternative view was expressed by a certain congressional Democrat who commented that "[t]he ship, I suppose, will be called the Experiment, as it is to be another [Whig] experiment upon the business of the people." He cautioned that the "Whig Congress [should] be warned by the fate of those who have gone before them" that such experiments bring only "vexations and disappointments." *Id.* at 483 (remarks of Rep. Birdseye).

¹⁹⁸ At the end of the nineteenth century, thirty-three states and territories allowed an insolvent debtor to pay or secure his creditors' claims at his complete discretion, while eighteen required some type of ratable distribution. Coles, *supra* note 48, at 283.

permitting an insolvent debtor to divide his estate to benefit, over distant lenders, a neighbor, fellow church member, or perhaps a local bank or supplier whom the debtor hoped to do business with in the future.¹⁹⁹ As an Iowa attorney wrote his congressman in 1898:

Under existing laws the bankers and jobbers here give credit to the merchants, without taking security, under promises that they will be given the first liens in the event of financial embarrassment. And being near their customers, their personal influence generally secures the fulfillment of such promises to the detriment of Eastern creditors.²⁰⁰

Preferences added an element of the provincial and the personal, and hence the unpredictable, to commercial life.²⁰¹ "The insolvent and assignment laws of the various states," the Merchants' Exchange of the City of Buffalo opined in 1884, "are in the main fruitful sources of injustice and evil. They are local, dissimilar and complicated."²⁰² So frustrating was this to out-of-state enterprises that some concluded it was "useless to try to drum those different states" where preferences were tolerated.²⁰³

Of course, the personal aspect of preferential payments was precisely its appeal to local elements, who contended that not all debts have the same moral standing and so should not be paid upon the same priority. Those to wealthy urban lenders, to whom a debtor is no more than an entry on a balance sheet, are simply not as morally significant as "debts of honor" to local concerns,

¹⁹⁹ Letter from John T. Hancock to F.C. Letts (Feb. 9, 1898), in Rec. H.R. H55-F19.1, National Archives, Washington, D.C.

²⁰⁰ Letter from J.C. Gates to Rep. D.B. Henderson (Jan. 17, 1898), in Rec. H.R. 55A-F19.1, National Archives, Washington, D.C.

²⁰¹ On the concept of "uncertainty discounts" as they affected American economic development, see Lance E. Davis, *The Investment Market, 1870-1914: The Evolution of a National Market*, 25 J. ECON. HIST. 355 (1965). On the effects of provincial legislation generally, see Thomas C. Cochran, *The Paradox of American Economic Growth*, 61 J. AM. HIST. 925, 935 (1975).

²⁰² Memorial of the Merchants' Exchange of the City of Buffalo (Apr. 15, 1884), in Rec. H.R. 48A-H12.3-8, National Archives, Washington, D.C. "Your memorialists, as merchants having dealings with the citizens of all the States of the Republic," stated another commercial group in 1843, "have long felt the necessity of some uniform and stable legislation whereby the rights and relations of debtor and creditor in all parts of the country should be ascertained and regulated." Memorial of Lewis Conain and 160 Other Citizens of Baltimore Praying that the Bankrupt Law May Not be Repealed (Jan. 14, 1843), in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.

²⁰³ Letter from Kawin & Co., Selling Agents, to Hon. D.B. Henderson (Dec. 17, 1897), in Rec. H.R. 55A-F19.1, National Archives, Washington, D.C.; see also Edwin S. Mack, *Bankruptcy Legislation*, 28 AM L. REV. 1, 8 (1894).

whose economic fate may be dependent upon their debtors' actions.²⁰⁴ These local lenders, indeed, may have given credit more out of personal loyalty than hope of profit and in reliance upon a reciprocal loyalty, in the form of a preference, if necessary.²⁰⁵

Preferences also appealed to the conservative individualism of certain parochial elements. They were said to exemplify the natural law right of "a debtor [to] the free control of a disposition of his property, in discharge of his debts,²⁰⁶ and that of the creditor to the rightful reward that comes of being quicker in pursuit of one's interests than the next person.²⁰⁷ One legislator quaintly described this latter principle as "the law of grinding at the mill—first come first served—which was the principle of the common law and justice."²⁰⁸

In dismissing such special pleading for preferences, the commercial elements adverted to what they considered larger concerns of social welfare. The "[c]ommunity at large has a heavy stake in the question," stated one member of Congress in 1841, "as a question of morals, and a question of political economy."²⁰⁹ This supposed interconnection between morality and political economy derived from the merchant attitude toward property and the need for collective action in its protection. Being property in exchange and thus perennially at risk, their own wealth was enhanced by any form of conduct that bolstered the certainty of return. The preferential payment, a matter of individual whim, had the opposite effect. Therefore, any man of commerce who followed his own personal views of charity or social obligation in preferring some creditors over others subverted the predictability of commercial relations and cheated the system out of a portion of its rightful

²⁰⁴ *Bankruptcy Affairs in the South*, 1 BANKR. REG. 141 (1868).

²⁰⁵ Thus a preference could function much in the manner of the "priority lien" that our present system permits in the administration of a bankruptcy estate. See *The Bankruptcy Law*, 5 W. VA. B. 149 (1898); S.F. Kneeland, *The Evolution of a Debt*, 1 THE COUNSELLOR 1, 2 (1891); Letter from C.H. Eighmey to Hon. D.B. Henderson (Mar. 4, 1898), in Rec. H.R. 55A-F19.1, National Archives, Washington, D.C.; cf. Note, *Prospect of a Federal Bankruptcy Law*, 32 AM. L. REV. 104-05 (1898); Memorial of the Merchants and Traders of the Town of Boston to the Congress of the United States (Jan. 10, 1829), in Rec. Sen. SEN 16A-G7, National Archives, Washington, D.C.

²⁰⁶ Petition of Citizens of Providence, Rhode Island for Repeal of Bankrupt Law, (Dec. 27, 1842), in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.

²⁰⁷ CONG. GLOBE app., 27th Cong., 1st Sess. 209 (1841) (remarks of Rep. Gordon) (opining that the common law aided the vigilant creditor and "left the dormant one to enjoy the fruits of slothfulness and inglorious ease"); Iowa-Nebraska Wholesale Grocers Association General Letter No. 77 ("Bankruptcy Bill") (Feb. 5, 1898), in Rec. H.R. 55A-F19.1, National Archives, Washington, D.C.

²⁰⁸ CONG. GLOBE app., 27th Cong., 1st Sess. 209 (1841) (remarks of Rep. Gordon).

²⁰⁹ *Id.* at 498 (remarks of Rep. Barnard).

returns.²¹⁰ Ironically, concern for others became a form of selfishness. As one scholar observes: "The Christian norm was replaced as a paradigm of behavior by the commercial predictability of traders."²¹¹ Following this reasoning, an 1898 editorial in the *Sioux City Tribune* fulminated: "I am fully persuaded that the opposition to a bankrupt law, at the present time, is founded upon selfishness, such selfishness that esteems itself more than government."²¹²

This normative construct comports perfectly with the demands of a capitalist political economy.²¹³ No standard of values is admitted beyond individual wants, as expressed through market transactions. Self-interest is accepted as the basis of individual conduct, so long as mediated by regulatory mechanisms to direct that impulse toward the maximization of social wealth. Thus "enlightened self-interest [rises] to the degree of wise statesmanship,"²¹⁴ and acquisitive conduct becomes a unifying force upon which true community can rest, not the divisive and corrupting factor posited by republicans. That the bankruptcy proceeding exemplifies this utilitarian view of community goes far toward explaining its role as public referendum on the capitalist presence in American life.

VI. RESOLUTION: THE BANKRUPTCY ACT OF 1898

A. *Old Conflict, New Era*

The passage of the Bankruptcy Act of 1898 brought to conclusion congressional deliberations of extraordinary intensity. Petitions concerning the Act, the great majority in favor, arrived from every state and territory. "[T]he archives of Congress are crowded with petitions," stated the chairman of the House Judiciary Committee, "that have been coming to us for years."²¹⁵

The tenor of discussion could hardly have been more impassioned or the scope more inclusive. The Act's opponents, most from regions that remained

²¹⁰ "[L]aws which serve such a man do not result in the greatest good for the greatest number[.]" HOUSE COMMITTEE ON THE JUDICIARY, UNIFORM SYSTEM OF BANKRUPTCY REPORT, H.R. REP. NO. 1228, 54th Cong., 1st Sess. 34 (1897); see also Memorial of the Chamber of Commerce of the City of Philadelphia (Dec. 9, 1819), in Rec. SEN. SEN 16A-G7, National Archives, Washington, D.C.

²¹¹ Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 17 (1986).

²¹² Letter from J.C. Kelly to Hon. D.B. Henderson (Mar. 26, 1898), in Rec. H.R. 55A-F19.1, National Archives, Washington, D.C.

²¹³ See KOHL, *supra* note 6, at 151.

²¹⁴ CONG. GLOBE, 39th Cong., 1st Sess. 2742 (1866) (remarks of Rep. Jenckes).

²¹⁵ 31 CONG. REC. 1789 (1898) (remarks of Rep. Henderson).

essentially agricultural,²¹⁶ once again unfurled the banner of agrarian localism and carried it forward into battle against the forces of concentrated wealth and centralized government.²¹⁷ The Act, they said, was a "piratic, diabolical" scheme of the "great plutocratic powers," intended to subvert the native virtues of the country for good and all. It would enable the federal judiciary to "become more dominant and powerful than ever heretofore"²¹⁸ and would provide corporations with "extended powers and privileges which they ought not to possess."²¹⁹ A South Dakota congressman observed:

It is perfectly apparant at this time that those who are now ruling this great Republic intend to establish an absolute aristocratic oligarchy upon the ruins of our free institutions, and this bill, which is two hundred years behind what we imagined our civilization to be, is one of the instruments by which it is attempted to be accomplished.²²⁰

The Bill's opponents marked in all this the "corruption" that, in republican theory, underlies all efforts to obtain special favors from government.²²¹ One privately published jeremiad, for example, pointed an accusing finger at "speculators in grain and stocks who, on account of the reckless character of their transactions [desire to] 'wipe off the slate' and be free to try it over again." Their devious instrumentalities included "a bureau to work it up . . . costly banquets given in its interests, and expensive and persistent lobbying done to secure its passage." In distress at his country's repeated flirtations with this form of legislation, the writer concluded with an unaccredited borrowing from Pope:

²¹⁶ See *id.* at 1913 (remarks of Rep. Gunn). When the "Torrey Bill," which formed the basis for the 1898 Act, passed the House on February 19, 1898, vote by geographic area revealed this division clearly:

Eastern States: 22 in favor to 2 against;
Middle States (New York to Maryland): 58 to 5;
Southern States: 18 to 60; and
Western States (including Midwest): 60 to 58.

Id. at 1946.

²¹⁷ See, e.g., *id.* at 1803 (remarks of Rep. Henry).

²¹⁸ *Id.* at 1793 (remarks of Rep. Underwood).

²¹⁹ *Id.* at 1795 (remarks of Rep. Underwood); see also *id.* at 1838 (remarks of Rep. Settle); *id.* at 1851 (remarks of Rep. Sparkman); *id.* at 1939 (remarks of Rep. Bodine).

²²⁰ *Id.* at 1917-18 (remarks of Rep. Kelly).

²²¹ *Id.* at 1806 (remarks of Rep. McRae); see also *id.* at 1844 (remarks of Rep.

Vice is a monster of so frightful mien,
As to be hated needs but to be seen,
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace.²²²

The Bill's supporters, for their part, insisted that it would "encourage trade, enlarge and extend credit, build up and promote business, put active, energetic, and brainy men at work, and add to the dignity and wealth of our common country."²²³ They equated it with the American spirit of enterprise and capacity for fair dealing, and a willingness to join the enlightened community of nations that had already heeded the call of commercial modernity.²²⁴ Its significant place in the program of the Republican Party, "the party of hope—of humanity—of civilization," was often remarked.²²⁵ So apparent did it seem that this legislation represented the shining path of the future that its detractors could only be those "who always oppose what is good and wise in legislation as in all things, idiots and knaves."²²⁶

B. *The Political Organization of Capital*

That this tradition of conflict would at last be resolved in favor of a permanent system of bankruptcy administration, "to place Credit and future commercial operations on a sound and immovable basis,"²²⁷ was the result of changes in social and economic structure that rendered bankruptcy administration of broader practical utility while undermining the traditional normative arguments against it. By the 1890s, most Americans no longer made

Smith).

²²² N.W. Bliss, *The Torrey Bankruptcy Bill—Redivivus* 4 (Feb. 9, 1892), in Rec. Sen. 52A-J14.1, National Archives, Washington, D.C.

²²³ Ray, *supra* note 145, at 46. *The Bankruptcy Magazine* was published specifically to advocate passage of the 1898 Act and was edited by Judge Jay Torrey, upon whose proposal that Act was based.

²²⁴ PROCEEDINGS OF THE NATIONAL ASSOCIATION OF CREDIT MEN, DOC. NO. 156, 55th Cong., 2d Sess. 42 (1898). Judge Torrey was also the president of the National Association of Credit Men. See Miller, *supra* note 46, at 71.

²²⁵ Letter from R.E. Doan to D.B. Henderson (Mar. 26, 1898), in Rec. H.R. 55A-F19.1, National Archives, Washington, D.C.; see also Letter from J.C. Kelly to D.B. Henderson (Mar. 26, 1898), in Rec. H.R. 55A-F19.1, National Archives, Washington, D.C.; Letter from W.H. Boutelle to D.B. Henderson (May 26, 1897), in Rec. H.R. 55A-F19.1, National Archives, Washington, D.C.

²²⁶ Hon. George W. Ray, untitled editorial, *BANKR. MAG.*, Oct. 1897, at 12.

²²⁷ Memorial of the Chamber of Commerce of Charleston, S.C. (Nov. 14, 1841), in Rec. H.R. 27A-G10.3, National Archives, Washington, D.C.

their living from agriculture, and most of our national wealth came not from farming but from commerce and manufacturing.²²⁸ Hence measures sympathetic to business enjoyed a growing constituency. And with the increasingly capital intensive nature of the economy, more Americans each year relied upon the credit system and understood its need for proper regulation.²²⁹

Over time, additionally, the business sector had learned to take a more systemic view of the needs of commerce and to act collectively to pursue them. Many businessmen had supported previous bankruptcy measures, but often as insolvents who intended to discharge their personal debts. Such measures therefore proved highly transitory, their constituencies waning when the failures resulting from particular economic dislocations had been addressed. Now business, as a community of interest, took a longer view and sought to place the relations of debtor and creditor on an ongoing, permanent basis, informed by general principles of wealth maximization.²³⁰

In part this reflected the accrued historical experience of the business community. Rejecting the traditional republican view of depressions as aberrant episodes caused by speculative binges, the capitalist sector now viewed economic dislocations as *natural* phenomena, like storms or hurricanes, that occurred periodically and affected all alike. Temporary discharge mechanisms were thus no longer sufficient; the business community recognized a collective need for a permanent relief mechanism.

The more collective dynamic within the business community is also attributable to the rise of certain organizational structures that acted to focus the previously diffuse political and economic power of various groups within the capitalist sector. An infrastructure of organizations with a long-term perspective on regulatory matters had emerged to lobby for measures useful to business and to protect and develop such programs once implemented. Of these organizations, the trade association, the large corporation, and the corporate law firm have particular relevance here.

Trade associations employ administrative processes to limit intra-member competition.²³¹ The benefits of cooperation, which might be unclear to individual members, become institutional values and are advanced by the ability of the organization to wield the collective influence of its membership and to

²²⁸ HISTORICAL STATISTICS OF THE UNITED STATES, U.S. BUREAU OF THE CENSUS D57-122 (1957).

²²⁹ L. DAVIS, AMERICAN ECONOMIC GROWTH 34 (1972).

²³⁰ REPORT OF A SPECIAL COMMITTEE AND ACTION BY THE [NATIONAL] BOARD OF [TRADE] CONCERNING THE BAILEY BILL AND THE TORREY BANKRUPT BILL, S. MISC. DOC. No. 83, 53d Cong., 2d Sess. 2 (1894).

²³¹ See THEODORE J. LOWI, THE POLITICS OF DISORDER 30, 69 (1971); see also THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 27-28 (2d ed. 1979).

delegate lobbying activities on their behalf. Accepting federal bankruptcy administration as a means of maximizing group welfare by, among other means, reducing costly squabbles over the assets of insolvent debtors, trade associations and chambers of commerce played a central role in the passage of the 1898 Act. Petitions arrived from organizations ranging in prestige from the National Board of Trade down to the New England Drysalters' Club in such volume as to take up six pages of fine print in the 1898 *Congressional Record*.²³²

The rise of the large corporation also proved hospitable to federal regulation. As one commentator stated: "The [1898 Act] is in line with consolidation, and that is the tendency of the age and the secret of better financial prospects."²³³ Although large firms were often self-identified as creditor elements, and so less frequently lobbied in favor of the 1898 Act than did trade associations, their bureaucratic and actuarial dynamic eventually led them to value the predictability brought by federal administration.²³⁴

Changes within the legal profession had a similar influence. Big corporations now directed their increasingly lucrative business to large metropolitan law firms, which could provide the comprehensive legal resources they needed. The corporate law specialist, emerging as the dominant element in the profession,²³⁵ was disinclined to engage in litigation in far-flung hamlets over small trade debts. Federal bankruptcy court provided the big firm lawyer

²³² Note, *Prospect of a Federal Bankruptcy Law*, 32 AM. L. REV. 104 (1898). The State of Missouri, for example, contributed petitions from the following groups: Associated Wholesale Grocers of St. Louis; Business Mens Club of Joplin; Cape Girardeau Board of Trade; Kansas City Commercial Club; Kansas City Paint, Oil and Varnish Club; Lawyers of Sedelia; Mechanics' Exchange, St. Louis; Merchant's Exchange, St. Louis; Mexican and Spanish-American Commercial Exchange, St. Louis; Missouri Bar Association, St. Louis; St. Charles Board of Trade; St. Joseph Board of Trade; St. Louis Credit Men's Association; St. Louis Furniture Board of Trade; St. Louis Paint, Oil and Drug Club; St. Louis Retail Grocers' Association; Springfield Board of Trade; Young Men's Business Association of Louisiana [Mo.]; Young Men's Commercial Club, Moberly; as well as others. 31 CONG. REC. 1906 (1898).

²³³ *Views on the Bankrupt Law*, *supra* note 177, at 166; see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 85 (1992).

²³⁴ Insurance companies, for example, discovered an aspect of bankruptcy administration that not only made their losses more predictable, but in fact reduced overall claims. With the repeal of the Act of 1867, claims for fire damage rose from eighty million to one hundred forty million dollars a year. Half of this increase, insurers estimated, could be attributed to a particular "moral hazard" associated with a no-bankruptcy situation. Rather than accept forced sale of their assets without any discharge of remaining indebtedness, many insolvents apparently succumbed to the temptation to realize a better return on their property through arson. *For a Bankrupt Act*, AM. LAW., Jan. 1893, at 2.

²³⁵ See, e.g., *The Decline of Litigation*, AM. LAW., Nov. 1893, at 5.

with a more convenient and neutral forum. The disproportionate influence of corporate law firms within the American Bar Association may explain its endorsement of the 1898 Act as "wise and beneficent legislation."²³⁶ Local practitioners, on the other hand, typically opposed the 1898 Act.²³⁷

The developments described above were responsible not only for the passage of the 1898 Act but also its permanence. While previous bankruptcy statutes had floated to enactment on the passing waves of popular demand that attended financial panics, to be repealed upon the return of prosperity,²³⁸ the 1898 Act was supported by an ongoing constituency of groups conscious of their vulnerability to those systemic tendencies, organized to enlist government power in their aid.²³⁹

C. *The Hamiltonian Dream Attained*

The establishment of a permanent system of bankruptcy regulation also reflected the extent to which geographic barriers had fallen to an expanding network of communications and transportation. The Hamiltonian dream of an economically integrated nation was now an accomplished reality and, consequently, centralized economic regulation was a widely recognized necessity.

With the post-bellum expansion in railroad building, distances that had previously raised substantial barriers to commercial intercourse were now mere numbers on railroad timetables,²⁴⁰ while the explosion in telegraph mileage (from 46,270 in 1867 to 190,303 in 1894) permitted information to flow instantly from coast to coast.²⁴¹ The progress of capitalist development had truly "annihilated . . . space with time." As one Massachusetts congressman stated:

The telegraph, the telephone, and the frequent and fast-flying mails have almost annihilated distance, and our nearly 180,000 miles of railroad enable us now in an incredibly short space of time to transfer from one state to another great masses of freight and merchandise which one hundred years ago were as immovable as mountains. The marvelous instrumentalities of modern

²³⁶ 3 LAW NOTES 202 (1900).

²³⁷ See Letter from J.C. Gates to D.B. Henderson (Jan. 17, 1898), in Rec. H.R. 55A-F19.1, National Archives, Washington, D.C.

²³⁸ *The Bankrupt Law, the Mischief and the Remedy*, DETROIT TRIB., Feb. 25, 1876, at 1.

²³⁹ *The Bankruptcy Law Again*, 4 LAW NOTES 1 (1900).

²⁴⁰ ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA* 59 (1982).

²⁴¹ The number of telegrams sent increased from 5,879,282 to 58,632,237 over the same period. H.R. REP. NO. 1228, 54th Cong., 1st Sess. 33 (1897).

commerce, undreamed of one hundred years ago, have compelled us to become commercially one people. State lines are eliminated.²⁴²

As a result of these changes, centrally administered firms now penetrated all areas of the nation, and the values of the most advanced elements within the business community were quickly disseminated everywhere.²⁴³ The result was an increasingly homogenous and integrated commercial world. The bonds of our commercial union, asserted the *Detroit Tribune*, "are even stronger than those of our political union."²⁴⁴

Capital markets, too, became more sophisticated and took on a national quality.²⁴⁵ "Credit is not sectional," observed one Iowa Republican, "it is national."²⁴⁶ Investment banking firms, mortgage companies, mutual savings banks, and building and loan associations directed capital to its most productive uses, wherever located. Capital mobility was further enhanced by the evolution of the correspondent banking system, which permitted the free transfer of credits among networks of banks, and by the use of the telegraph to speed communication between financial institutions.²⁴⁷

The expansion of the credit system was further fueled by the increased availability of credit information on prospective borrowers.²⁴⁸ By the end of the century, the Mercantile Agency (predecessor to Dun & Bradstreet) and its imitators had established an industry in information.²⁴⁹ In addition, city banks now routinely conducted credit investigations of prospective borrowers as a service to their corresponding banks in small towns.²⁵⁰

Federal bankruptcy administration was a logical outgrowth of these developments in transportation, finance and commercial organization.²⁵¹ Many

²⁴² 31 CONG. REC. 1847 (1898) (remarks of Rep. McCall).

²⁴³ See generally HAROLD BARGER, *DISTRIBUTION'S PLACE IN THE AMERICAN ECONOMY SINCE 1869* 3-6 (1955); T. BENIGER, *THE CONTROL REVOLUTION* 187 (1986); CHANDLER, *supra* note 163, at 289; BORIS EMMET & JOHN E. JENCK, *CATALOGUES AND COUNTERS: A HISTORY OF SEARS, ROEBUCK AND COMPANY* 15 (1950); KIRKLAND, *supra* note 164, at 264-67; FRED A. SHANNON, *THE FARMER'S LAST FRONTIER* 349 (1966).

²⁴⁴ Quoted in BANKR. MAG., Mar, 1898, at 30.

²⁴⁵ See JONATHAN HUGHES, *THE VITAL FEW* 360 (1966).

²⁴⁶ 31 CONG. REC. 1790 (1898) (remarks of Rep. Henderson).

²⁴⁷ See generally JOHN A. JAMES, *MONEY AND CAPITAL MARKETS IN POSTBELLUM AMERICA* 124-25 (1978).

²⁴⁸ *The Best Managed Credit Department in the World*, 1 NAT'L BANKR. NEWS 13 (1898).

²⁴⁹ See ROY A. FOULKE, *THE SINEWS OF AMERICAN COMMERCE* 275-302 (1941).

²⁵⁰ See CHESTER A. PHILLIPS, *BANK CREDIT* 148-49 (1931).

²⁵¹ See 31 CONG. REC. 1916 (1898) (remarks of Rep. Ray); *id.* at 1789 (remarks of Rep. Henderson).

corporations had grown so geographically extensive and financially complex that to administer their bankruptcies through a jumble of overlapping and conflicting state court actions was obviously impractical. Further, the administrative resources necessary to adequately address their insolvencies were beyond what many states could muster.

The limitations of local regulation in a national economy were particularly well illustrated by the changing position of the preference. By the end of the century, preferences no longer appeared an effective bastion of the local and personal in business life.²⁵² To those who asserted that federal bankruptcy law was a scheme to allow the Eastern monied interests to defeat the time-honored ability of local creditors to satisfy their claims first under state grab laws, it was now replied that the East no longer derived any such advantage from bankruptcy measures. Stated the Chairman of the House Judiciary Committee:

[T]he farther away the creditor may be the sharper will be his watchfulness. He will have his collection agents or attorneys near the debtor with a watchful eye upon his interests and will exercise greater vigilance than the nearer creditor will. *In addition to this, the difference between location of creditors is destroyed by the wonderful facilities that now exist for sending telegrams and for speedy modes of travel between all parts of the country.* The Eastern creditor can send a telegram to his attorneys which will put him on the ground as quickly as the nearer creditor.²⁵³

An important advantage of provincial creditors, better information about their debtors, had indeed diminished with changing business practices. Organizational efficiency was replacing geographic proximity as the critical factor. "In nearly every town in the United States," it was declared, "mercantile agencies are established, and a failure or fraudulent transfer of property in a remote town in Texas is known as soon in New York or Boston as in the town itself."²⁵⁴ The large dry goods houses maintained their own credit reporting systems, which were often superior to those of local banks in monitoring their mutual debtors.²⁵⁵ "[T]heir system of espionage is perfect," observed one member of Congress, and when insolvency threatened, they secured "a preference in the shape of a mortgage, chattel or otherwise, or the unfortunate debtor is closed up."²⁵⁶ For that reason, Marshall Field &

²⁵² PROCEEDINGS OF THE NATIONAL ASSOCIATION OF CREDIT MEN, S. DOC. NO. 156, 55th Cong., 2d Sess. 10 (1898); Letter from John Hancock & Sons to F.C. Letts (Feb. 2, 1898), in Rec. H.R. H55-F19.1, National Archives, Washington, D.C.

²⁵³ 31 CONG. REC. 1789 (1898) (remarks of Rep. Henderson) (emphasis added).

²⁵⁴ 16 CONG. REC. 461 (1885) (remarks of Rep. Moulton).

²⁵⁵ *The Best Managed Bank Credit Department in the World*, *supra* note 248, at 13.

²⁵⁶ 31 CONG. REC. 1839 (1898) (remarks of Rep. Alexander); *see also id.* at 1835

Company was the most energetic opponent of the 1898 Act, going to the length of distributing to its customers "machine protests" against the Act, to be signed and mailed to Congress.²⁵⁷

Because their recipients were now so often the forces of concentrated capital, preferential payments could no longer be said to satisfy local "debts of honor" ahead of other claims.²⁵⁸ Thus had another aspect of the individual in American life fallen to the onrush of progress. Although it was said that the 1898 Act eliminated the personal aspects of business relations,²⁵⁹ in truth it merely reflected the impersonal social dynamic that a maturing capitalism brought in its train.

D. *The Decline of Economic Individualism*

As America conformed more each day to the Hamiltonian ideal, the traditional bastions of the virtuous republic seemed not merely under attack by an ever-increasing tide of corruption, but in fact subverted by social changes that stripped them of all practical relevance. The republican ideal of economic individualism had become problematic in an era of giant corporations, trusts and pools, when uncountable young men had "fallen under the wheels of the Standard Oil Company, or . . . contributed to the success of that monstrous iniquity, throughout their lives, from the need of taking employment wherever they could find it."²⁶⁰ Who could trust in principles of small producer democracy when the economy was seen as a vast engine disposed toward the destruction of the common man?²⁶¹ Big capital demanded big government to protect the citizenry, not wistful paeans to the independent yeoman.²⁶²

Among the traditional elements of economic individualism, the natural law

(remarks of Rep. Moody).

²⁵⁷ See *id.* at 1902-04 (remarks of Rep. Grosvenor); *id.* at 1835 (remarks of Rep. Moody); *Declared to Be a Miserable Compromise*, 1 NAT'L BANKR. NEWS 5 (1898).

The McCormick Harvesting Machine and Wilson Sewing Machine companies had likewise penetrated local economic life so completely as to prefer state to federal regulation of insolvency. 16 CONG. REC. 461 (1885) (remarks of Rep. Moulton).

²⁵⁸ Note, *supra* note 232, at 105.

²⁵⁹ *Views on the Bankrupt Law*, *supra* note 177, at 66.

²⁶⁰ Moses Hallett, *The Private Corporation in Sociology*, in REPORT OF THE COLORADO BAR ASSOCIATION 118, 122 (1899). On the changes in American social mores caused by the increasingly dominant position of the corporation, see OLIVER ZUNZ, MAKING AMERICA CORPORATE: 1870-1920 (1990).

²⁶¹ See 31 CONG. REC. 1797 (1898) (remarks of Rep. Lanham).

²⁶² See MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS 180 (1988); JOHN A. GARRATY, THE NEW COMMONWEALTH, 1877-1890 ch. 1 (1968).

view of contract was particularly undermined by the consolidating tendency of the age. When "all are interdependent and none are independent,"²⁶³ assertions that contracts represent the morally inviolable product of individual free will, so long deployed in opposition to federal debt relief measures, become implausible. Whether a farmer shipping produce to market or a factory employee, the individuals situation in a modern commercial economy is too obviously influenced by forces he or she can do little to control through private bargain.

Further, the frequency with which corporations were now parties to contracts proved additionally unsettling to a "free will" view of obligation. Speaking of the "will" of a corporation smacks of fiction.²⁶⁴ Moreover, the very purpose of the corporate form—to encourage capital formation through the enticement of limited liability—flies in the face of absolutist conceptions of contract rights. Indeed, because the law enforces corporate obligations only to the extent of corporate assets, the corporate form acts as a prospective method of debt relief. "The law of their incorporation is or should be bankrupt law enough for them," a Senate report remarked when it was proposed that corporations be granted the benefits of bankruptcy.²⁶⁵

The largest nail in the sacred coffin, however, was delivered by post-bellum monetary policy. In a move back toward the gold standard, Republican administrations retired a portion of the greenbacks issued to finance the Civil War, causing currency deflation and the resulting practical appreciation of existing debts.²⁶⁶ Foremost among the debtor elements hurt by this development were farmers.²⁶⁷ This provided an object lesson in the political dimension of contract. Not only did it now appear that the individual's ability to perform his obligations was affected by macroeconomic forces beyond his control, as the commercial sectors had long insisted, but the very *amount* of his debts, determined in dollars of constant buying power, rose and fell with such influences. This year's dollar was an entirely different thing from next year's. "The change in the currency from year to year has been so great, so violent,"

²⁶³ Benjamin A. Richmond, *The New Feudalism*, 6 AM. LAW. 413, 414 (1898); see also ERNST FREUND, *THE LEGAL NATURE OF CORPORATIONS* (Chicago, University of Chicago Press 1897).

²⁶⁴ On the mysterious nature of corporate intent and conduct, see TRACHTENBERG, *supra* note 240, at 84; HORWITZ, *supra* note 233, at 65–108.

²⁶⁵ H.R. REP. NO. 5, 27th Cong., 1st Sess. 7 (1841).

²⁶⁶ See ALLAN G. BOGUE, *MONEY AT INTEREST* 2 (1955); MILTON FRIEDMAN & ANNA SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES: 1867–1960*, at 32–48 (1963); SHANNON, *supra* note 243, at 184–88.

²⁶⁷ See SHANNON, *supra* note 243, at 126–48; Everett E. Edwards, *American Agriculture—The First 300 Years*, in FARMERS IN A CHANGING WORLD: YEARBOOK OF AGRICULTURE, 1940, H.R. DOC. NO. 695, 76th Cong., 3d Sess. 260–65 (1940).

one senator had noted in 1867, "that the word 'dollar' in which all contracts are made and in which they must be enforced, has been continually changing in its meaning."²⁶⁸

Populists and Democrats responded by advocating a policy of "free silver" intended not only to increase the amount of specie in circulation, but also to fix its value in relation to gold in such a way as to cheapen the dollar and reverse the transfer of wealth effect of previous deflationary policies, so that now debtors would be the gainers.²⁶⁹ However designated, this was nothing else but a federal program of debt relief. Thus the farm sector implicitly acknowledged that contractual duty could in no literal sense be absolute, being always relative to a matrix of other factors that rendered its ethical force conditional upon the normative justice of the political and economic backdrop.²⁷⁰

Because the bankruptcy debate brought these disturbing changes in the polity into high relief, opposition to the Act took on a last-stand urgency for those in the republican tradition. As the utility of bankruptcy relief became ever more apparent, however, the connection between defeating the Act and any practical defense of the "one genuine America," became elusive, a matter more of symbol than substance. As illustration, in mourning the passing of our national virtue one Nevada senator drew a parallel between bankruptcy legislation and the decline of the Roman Empire, supported with quotations from Brooks Adams's, *The Law of Civilization and Decay*.²⁷¹ Similarly, the congressman who described the 1898 Act as part of the plan of the rich and powerful to "crucify this nation on a cross of gold" did not mean to assert a direct conflict between bankruptcy law and free silver monetary policy.²⁷² Rather, he invoked the most compelling image from the iconography of agrarian populism to denounce what he saw as a general and highly symbolic legislative endorsement of a diverse, pluralistic, capitalist society to be erected

²⁶⁸ 12 CONG. REC. 949 (1867) (remarks of Sen. Doolittle); *see also* 31 CONG. REC. 1807 (1898) (remarks of Rep. McRae).

²⁶⁹ *See* FRIEDMAN & SCHWARTZ, *supra* note 266, at 45-115.

By the 1890s, this form of federal debt relief was seen by many farmers as a panacea for all of their ills. KELLER, *supra* note 164, at 571-87; RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 60-94 (1955); *see also* Richard Hofstadter, *Introduction* to WILLIAM H. HARVEY, *COIN'S FINANCIAL SCHOOL* (Richard Hofstadter ed., 1963).

²⁷⁰ *Cf.* 31 CONG. REC. 1845 (1898) (remarks of Rep. Smith). On the shift away from an absolutist view of contract generally, *see* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

²⁷¹ 31 CONG. REC. 2315 (1898) (remarks of Sen. Stewart).

²⁷² *Id.* at 1806 (remarks of Rep. Henry). Also raising the free silver issue in the bankruptcy debate were: *id.* at 1862 (remarks of Rep. Kitchen); *id.* at 1889 (remarks of Rep. Sulzer); *id.* at 1912 (remarks of Rep. Gunn); *id.* at 2316 (remarks of Sen. Stewart).

upon the ashes of the Jeffersonian ideal.

VII. CONCLUSION

The bankruptcy debate revealed with unique clarity the inner workings of two opposed social paradigms that deeply informed nineteenth century American life. One of these, derived from the experience of a pre-capitalist, essentially agricultural polity, defended a closed and largely static system of political economy. Conservative in the most literal sense of the term, it cherished that which already was and had proved itself good, that which could be touched and freely exchanged, that which carried familiar names and knew how to stay where it belonged. It resisted the rootless, the too quick and easy, the illusory, and, quite often, simply the new.

Standing in opposition was a social philosophy derived from the commercial experience. Faith in the progressive effects of acquisitive activity, and in a national unity of interest in the hegemony of commercial culture, were its fundamental tenets. Its view of state power was positivist and utilitarian.

Both traditions of thought were democratic in their stated intention to promote the will of the people. Both were liberal in their support for the unhampered economic striving of the populace. That they argued to different conclusions from a shared political vocabulary was the result of the divergent meanings that different modes of material life imparted to such abstractions as the rights of property and contract, individual economic freedom and national community.

It is fitting that developmental capitalism and federal bankruptcy administration came to maturity during the same period of American history. Bankruptcy exemplifies the basic premises of developmental capitalism: the elimination of the personal from economic life, the abstraction of property interests into market values, and the regulation of commerce from a purely utilitarian standpoint. Moreover, it stands upon many of the same institutional underpinnings, including a modern credit system. This congruence, as we have seen, did not escape the notice of the American people, who addressed the issue of bankruptcy as going to the essence of our national economic identity. Thus our endorsement of federal bankruptcy administration signalled an acceptance of commercial modernity, in the fullest sense, as our national destiny.

